

# Tort Liability in France for the Act of Things: A Study of Judicial Lawmaking

Edward A. Tomlinson

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# TORT LIABILITY IN FRANCE FOR THE ACT OF THINGS: A STUDY OF JUDICIAL LAWMAKING

Edward A. Tomlinson\*

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## I. INTRODUCTION

The French Civil Code of 1804, promulgated by Napoleon shortly before he became Emperor, put into statutory form vast areas of French

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\* Professor of Law, University of Maryland. I would like to thank for their advice Rett Goldberg, Alan Hornstein, Peter Quint, Jana Singer, and the students in my Civil Law Seminar, especially Jill Coleman and Karen Kerr. I would also like to thank Dean Michael J. Kelly for his financial support.

private law. The 2,283 articles of the original Code governed what those trained in the common law would call the law of torts, contracts, property, and the family (including the law of inheritance). Surprisingly, only five of those two-thousand-plus articles (articles 1382 to 1386)<sup>1</sup> addressed what we would call tort law. Article 1382 proclaimed the fault principle: one must make reparation for injuries caused by one's fault. Article 1383 then defined fault to include negligence. The remaining three articles imposed liability based on the defendant's relationship to some other person or thing. Article 1384 defined those situations where one person is liable for injuries caused by another (e.g., by one's child, employer or pupil), and articles 1385 and 1386 imposed liability for injuries caused by one's animals and by the collapse of one's buildings. The original texts thus adopted a dual approach: liability was either fault-based or based on the defendant's relationship with the injury-causing person or thing.

The French legislature has retained these meager articles basically unchanged despite the political, economic, and social upheavals that France has undergone since the time of Napoleon. On four occasions the legislature amended article 1384, but those changes only affected special cases of liability<sup>2</sup> and not the basic principles. The legislature has also enacted a number of laws outside of the Civil Code that formulate special liability rules for injuries inflicted by aircraft, cable cars, nuclear-powered ships and plants, and motor vehicles. The first three laws only superseded the Civil Code articles in very narrow, specialized areas;<sup>3</sup> and it was not until 1985, when the Parliament finally enacted legislation to govern motor vehicle accidents, that the legislature found it desirable to change, for a major area of French life, the liability rules found in the Code Napoleon.<sup>4</sup>

This legislative passivity contrasts sharply with the active role which the courts have played in developing French tort law. Since the turn of

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1. The French and English texts of articles 1382 to 1386, as promulgated in 1804, may be found in Appendix 1.

2. For the French and English texts of the present article 1384, see Appendix 2. The footnotes to the texts designate the three amendments that are still in force. The last of these amendments repealed an earlier amendment (not reproduced) which only affected the liability of teachers. See 1 H. Mazeaud, L. Mazeaud, and A. Tunc, *Traité théorique et pratique de la responsabilité civile* n° 76, at 81 (6th ed. 1965) [hereinafter cited as 1 *Traité théorique*]. Citations of French treatises will give both paragraph and page numbers to facilitate the use of other editions. Although pagination varies from one edition to the next, paragraph numbering normally remains the same. Mazeaud, Mazeaud, and Tunc, cited here, is the principal French treatise on tort liability.

3. See 1 *Traité théorique*, *supra* note 2, n°° 77 to 80, at 82-83.

4. For discussion of this law of July 5, 1985, see B. Starck, *Droit civil obligations: 1 Responsabilité délictuelle* n°° 588 to 644, at 283-309 (2d ed. 1986).

the century, judicial attention has focused on the last eight words in paragraph 1 of article 1384 (article 1384-1°),<sup>5</sup> which holds a person liable for injuries caused by the act "of things that he has under his guard."<sup>6</sup> That provision attracted little attention at the time of the Code's enactment. Everyone understood it to be a transitional provision preparing the reader for the special rules imposing liability on the owners of animals and collapsing buildings, the specific "things" enumerated in the two articles that immediately followed it (articles 1385 and 1386). No one contemplated the possibility of liability based on the defendant's relationship with other, unenumerated things.

This inauspicious beginning did not prevent the courts from constructing a remarkable edifice on the slim text of article 1384-1°. Beginning in the 1890s, courts found defendants liable based on their "guard" of things whose "acts" caused injury. Courts expended tremendous effort to define the concepts of "guard" and "the act of a thing." The guardian's liability, perhaps because it resembled the owner's liability under articles 1385 and 1386, proved to be more strict than fault-based. This feature naturally encouraged injured persons to invoke it, and the courts responded by applying article 1384-1° in a wide variety of situations to impose something close to strict liability on guardians, normally business enterprises or other property owners, for the injurious "acts" of things under their guard.

In a series of lead cases, for example, the courts held the guardian responsible under article 1384-1° when a tugboat's boiler exploded and killed an employee (the *Teffaine* case),<sup>7</sup> when an uncovered shipment of resin caught fire and destroyed adjoining property (*The Resins of Bordeaux* case),<sup>8</sup> and when a truck driven by a department store's deliveryman ran over a little girl (the *Jand'heur* case).<sup>9</sup> As a result of this judicial discovery of article 1384-1°, the guard of the injury-producing thing has largely replaced fault as the principal basis of liability for personal injury or property damage. Ironically, the courts have refused to extend the benefits of article 1384-1° to persons injured by

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5. For the convenience of the reader, the respective paragraphs of Code articles will hereinafter be designated in the French style. Thus, the first paragraph of article 1384 becomes article 1384-1°.

6. The French phrase is "des choses que l'on a sous sa garde." I have translated "garde" as "guard" to emphasize the distinctiveness of the French concept. 4 J. Carbonnier, *Droit civil: les obligations* n° 110, at 427 (10th ed. 1979) (citing consistent recent interpretation of "guard" by the courts). For the definition of "guard," see *infra* note 145.

7. For discussion of *Teffaine*, see *infra* text accompanying notes 104-17.

8. For discussion of *The Resins of Bordeaux*, see *infra* text accompanying notes 127-34.

9. For discussion of *Jand'heur*, see *infra* text accompanying notes 146-92.

animals and collapsing buildings; for injuries inflicted by those specially enumerated things, the victim may only invoke the potentially less favorable special provisions in articles 1385 and 1386 (the *Bardinet and Sons* case).<sup>10</sup>

Describing the history of the guardian's liability under article 1384-1°, a story familiar to all French lawyers, serves a number of purposes. First, it permits a substantive comparison of French tort law with the law of strict liability as it has developed in common-law jurisdictions. Skilled comparativists have already accomplished that task,<sup>11</sup> and none have concluded that the French approach merits emulation elsewhere. Despite the uncertain scope of strict liability under the doctrine of *Rylands v. Fletcher* (the closest common-law analogue to the guardian's liability under article 1384-1°), we would do well to continue tending our own garden and to avoid importing exotic varieties of liability. The benefits of this study, therefore, lie more in the realm of process than of substance. The history of article 1384-1° tells us a great deal about how a civil-law system works. What is the role of the Code itself? How do jurists, both judges and academics, interpret the Code? How do courts justify their decisions applying the Code? Do the courts have a creative, lawmaking function? What is the precedential effect of a judicial interpretation? The answers that the French system gives to these questions should interest lawyers in this country, given what Professor Calabresi calls the increased "statutorification" of American law.<sup>12</sup> In particular, the French courts have confronted, although they have not fully resolved, the problem increasingly confronting common-law courts of what to do with outdated statutes manifestly unsuited to present conditions. Until at least 1985, French courts decided almost all tort cases under statutes drafted for a pre-industrial, pre-automotive age. Their performance stands as a tribute to what judges can do.

## II. SOURCES OF FRENCH LAW

### A. Codification

The courts' role in the development of French tort law certainly runs counter to the accepted wisdom on the effect of codification in the civil-law tradition. Common-law judges make law, while judges in civil-law jurisdictions supposedly apply the law made by the legislature. Such a narrow view of the judicial function stems from the ideology

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10. For discussion of *Bardinet and Sons*, see *infra* text accompanying notes 196-203.

11. See, e.g., 2 K. Zweigert and H. Kötz, *An Introduction to Comparative Law* 322-28 (1st ed. translated by Tony Weir 1977).

12. G. Calabresi, *Common Law in the Age of Statutes* 1 (1982).

of the French Revolution.<sup>13</sup> The principal courts of the Old Regime (the Parliaments) were bastions of aristocratic privilege, and the judges resisted any efforts at reform initiated by the king and his ministers. The judges frequently decided cases according to their own prejudices rather than through the faithful application of royal ordinances. To subjugate this unruly judiciary, the Constituent Assembly, which governed France from 1789 to 1791, enacted a law establishing a new court system with elected judges and forbidding the courts from participating directly or indirectly in the exercise of the legislative power.<sup>14</sup>

The statutory provision barring judges from legislating was an outgrowth of Montesquieu's writings on the separation of powers. Montesquieu had a very limited view of the judicial function. Judges were no more than the "mouthpieces" of the law the legislature promulgated; they were only "inanimate agents" who could modify neither the force nor the rigor of legislation.<sup>15</sup> This desire to make the judicial function a mechanical one was widespread among the revolutionaries. As explained in 1790 by a rising young lawyer from Arras named Maximilien Robespierre, the word "case law" should be banished from the French language, because in a state with a constitution, the law applied by the courts can only be statutory law.<sup>16</sup>

Hostility to judge-made law led the Constituent Assembly, when it passed its great law of August 16-24, 1790 organizing the judiciary, to deny the judges any power "to make regulations" and to require them "to address themselves to the legislature whenever they think it necessary to interpret a law or to make a new one."<sup>17</sup> In other words, the judges

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13. J. Merryman, *The Civil Law Tradition* 25ff (2d ed. 1985).

14. Law of August 16-24, 1790, on the Organization of the Judiciary. For its provisions, see 1 H. Solus and R. Perrot, *Droit judiciaire privé* n° 42 to 48, at 43-46 (1961). For more general discussion, see J. Dawson, *Oracles of the Law* 374-76 (1968). Article 10 of title II of the law, which remains in effect today, forbids the courts to "prendre aucune part à l'exercice du pouvoir législatif." C. adm. at 18 (*Dalloz Code administratif*) (1985).

15. Montesquieu, *Esprit des lois*, Book XI, chap. VI.

16. Quoted in 1 F. GénY, *I Méthode d'interprétation et sources en droit privé positif* n° 45, at 91 (2d ed. 1919) [hereinafter cited as GénY, *Méthode*]. GénY's magnificent study focuses on how judges should interpret the Code; it contains in addition a thorough discussion of the historical origins of the Code and of the Court of Cassation (the highest court in France). For an English translation of the 1919 edition, see J. Mayda, *Méthode d'interprétation* (Louisiana State Law Institute 1954) (same numbered paragraphs).

The French word Robespierre wished to ban was "jurisprudence," which most scholars have translated as "case law." The French word "loi" refers only to statutory law.

17. Law of August 16-24, 1790, tit. II, art. 12, as translated in J. Dawson, *Oracles of Law* 376 (1968). For the French text (apparently still in force), see C. adm. at 18 (1985). For the subsequent interpretation of the prohibition of judge-made regulations, see *infra* notes 82 and 95-97 and accompanying text.

should not make law themselves but should refer doubtful questions of law to the legislature itself for resolution. This legislative referral, however, was an optional procedure because the law allowed the judges themselves to decide whether a question was doubtful.<sup>18</sup>

A necessary component of this effort to subjugate the judges was the enactment of a comprehensive private law code to replace the mixture of customary and received Roman law applicable in pre-Revolutionary France. Indeed, the replacement of this tangled, often barbarous mess with an enlightened code based on principles of reason and natural justice and stating the law in clear and simple terms was even higher on the revolutionary agenda than was the demolition of the old Parliaments.<sup>19</sup> The Constituent Assembly realized that it was not possible to fetter the judges unless the legislator clearly stated what the law was.<sup>20</sup>

Codification proved to be a more difficult task than the revolutionaries had believed it to be. Moreover, domestic terror and foreign wars distracted their attention. It was only when Napoleon as First Consul restored order at the very end of the eighteenth century that conditions became ripe for codification. Napoleon appointed a four-member commission that produced a draft Civil Code in four months. Napoleon took an active interest in the project, and it was only through his personal tactics and occasionally high-handed efforts that the recalcitrant and cumbersome legislative machinery of the Consulate approved the Code, which Napoleon then promulgated on March 21, 1804.<sup>21</sup> The promulgation of four other codes quickly followed,<sup>22</sup> but the Civil Code (officially designated the Code Napoleon in 1807) justly remains the most important. It has governed most private legal relationships in France for almost two centuries.<sup>23</sup>

Revolutionary ideology was still widespread at the time of the Code's drafting. Indeed, the promulgation of the Code ratified the principal accomplishment of the Revolution: the substitution of a regime of civic

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18. G. Sautel, *Histoire des institutions politique depuis la révolution française* n° 125, at 162-63 (6th ed. 1985). For a discussion of the mandatory referral procedure instituted in 1790, see *infra* text accompanying note 57.

19. W. Seagle, *The Quest for Law 277ff* (1941); J. Merryman, *The Civil Law Tradition* 25-29 (2d ed. 1985).

20. 1 Gény, *Méthode*, *supra* note 16, n° 41, at 82.

21. 1 G. Marty and P. Reynaud, *Droit civil* n° 69, at 127-30 (2d ed. 1972).

22. The Penal Code, the Code of Civil Procedure, the Code of Criminal Procedure, and the Commercial Code. *Id.* n° 73, at 137-38.

23. Upon their return to the throne in 1815, the Bourbons retained the Code under the title of Code Civil. The subsequent French Republics, perhaps none too confident of their staying power, have never formally deleted the Code's references to the king. See, e.g., C. civ. art. 1 (Dalloz Code civil) (1985-86).

equality for one of special privilege. Not surprisingly, a number of its provisions reflected the revolutionaries' views on the supremacy of written law and the subordinate role of judges. Article 7 of a companion law, which governed how and when the Code should take effect, denied any further legal force to Roman law, royal ordinances, and general and local customs,<sup>24</sup> while article 5 of the Code itself reiterated the prohibition of judge-made "regulations."

To the eyes of most observers, the Code conformed to the revolutionary model of a comprehensive statement of the general will by the legislator that left to the judges only the mechanical task of application. One potentially discordant provision was article 4, which threatened to punish judges who refused to decide a case on account of the silence, obscurity, or insufficiency of the law. But it was and still is unclear whether the drafters meant that there could be no gaps in the Code or that the judges had to decide all cases even if there were gaps.

#### *B. Interpretation of the Code*

In his magisterial study on methods of interpretation and sources of French private law, first published in 1899, François Géný, a law professor and later dean at the University of Nancy, argued that the lawmakers of 1804 had quite a different idea on the role of codified law.<sup>25</sup> According to Géný, the Code did not emerge as a complete statement of all the legal rules needed to resolve future cases, but had gaps which became more pronounced with the passage of time. The lawmakers realized the unfinished state of the Code and expected the judges to complete it over time.

The correctness of Géný's thesis probably depends on whom you consider to be the lawmakers of 1804: the four professional jurists who drafted the Code or the legislators who, pressured by Napoleon, approved it. The professional drafters were surely on Géný's side of the issue. Jean-Marie Portalis, the most influential of the four commissioners, wrote an eloquent introduction to the draft prepared by the commission in which he argued that a country could no more dispense with case

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24. Law of 30 ventôse an XII [1804] reproduced in the Dalloz Code civil after article 6.

25. 1 Géný, *Méthode*, supra note 16, n° 46, at 97. The second or 1919 edition of Géný's work, cited here, reproduces the text of the 1899 edition with additions marked by parentheses.



law than it could dispense with statutes.<sup>26</sup> All the legislature could do was promulgate general principles "fertile in their consequences." It could not "descend" to the level of detail and could not anticipate all cases that might arise.<sup>27</sup> It was for the judges to "implement, ramify, and extend" those principles and, with the benefit of experience, to "fill" over time the "gaps" in the Code.<sup>28</sup> In other words, a Code did not emerge full blown from the breast of the legislator, but was only made with the passage of time and the help of the courts. In fulfilling this creative role, judges should follow, in the absence of a controlling text, ancient usages, a course of like decisions, or a received maxim; if nothing else were available, the judge should then resort to principles of natural law.<sup>29</sup>

Whether Napoleon and his fellow lawmakers, many of them old revolutionaries, shared Portalis' views is uncertain. Portalis had very little impact on legal writers in nineteenth century France,<sup>30</sup> which provides strong evidence that his views were not widely accepted in 1804. The quite different approach to the Code that did prevail through the nineteenth century was that of the Exigetical School.<sup>31</sup> This new generation of academic treatise writers was bedazzled by the monumentality of the Code and was both untrained and uninterested in pre-Code law. Leadership quickly passed to them after a brief transition period dominated by practitioners who were familiar with pre-Code authorities and continued to invoke them before the courts.<sup>32</sup>

The scholars of the Exigetical School believed that the Code was complete upon promulgation and provided a sufficient basis to resolve all cases. All the interpreter had to do was to implement the intent of the drafters. Where the text itself was clear, there was no need for interpretation; the judge only had to apply the text. If the text was not

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26. J-M Portalis, *Discours préliminaire*, in 1 P. Fenet, *Recueil complet des travaux préparatoires du Code civil* 463, 476 (1827). Fenet reproduced in fifteen volumes the legislative history of the Civil Code. For a discussion of Portalis' role and translations of the most significant passages from his *Discours préliminaire*, see Tunc, *Methodology of the Civil Law in France*, 50 *Tul. L. Rev.* 459 (1975); Tunc, "The Grand Outlines of the Code," in *The Code Napoleon and the Common Law World 19-45* (B. Schwartz ed. 1954).

27. Tunc, *Methodology of the Civil Law in France*, 50 *Tul. L. Rev.* 459, 470-71 (1975).

28. *Id.* at 476.

29. *Id.* at 471.

30. Portalis' *Discours préliminaire* was largely ignored until Géný invoked it in 1899.

31. On the Exigetical School, see J. Bonnet, *L'école de l'exégèse en droit civil* (2d ed. 1924); E. Gaudemet, *L'interprétation du Code civil en France depuis 1804*, at 18-56 (1935). See also Géný's devastating attack on the inadequacy of the School's approach in 1 Géný, *Méthode*, *supra* note 16, n<sup>o</sup> 31 to 82, at 61-204.

32. J. Dawson, *Oracles of the Law* 382-86 (1968).

clear, then the interpreter utilized one of three methods of interpretation, grammatical, logical, or historical, to discover the intent of the law-maker.<sup>33</sup> The scholars associated with the Exigetical School, mainly law professors, but occasionally judges, showed little interest in how the courts were deciding cases under the Code. They believed their mission was to make sense of the Code itself, although they naturally expected that courts would pay some attention to their work.

From a common-law perspective, the Exigetical School took a fairly bold approach to statutory interpretation. Nineteenth century common-law judges tended to view statutes as alien intruders deserving as narrow a construction as possible so as to protect the domain of judge-made law.<sup>34</sup> The Exigetical School did not share this hostility to statutes since it recognized the Code as the sole source of law. There was no common law to fall back on, and some Code article had to apply in every case. If the context or structure of the text did not provide an answer to a question (grammatical interpretation), then the interpreter searched for the purpose behind the text (historical interpretation) or drew analogies from related texts (logical interpretation). The interpreter thus did routinely what common-law judges refuse to do still: to apply a statute to analogous cases not covered by its literal terms.<sup>35</sup>

Gény's magisterial treatise put an end to the Exigetical School as a respectable intellectual enterprise. He condemned as sophism the Constituent Assembly's denial of a creative role for judges<sup>36</sup> and ridiculed the Exigetical School's "fetishism" for written, codified law.<sup>37</sup> However, Gény's main point was not that the School's interpretive methods were wrong but that they were insufficient. Like Portalis, whom he quoted at length, Gény believed that any Code inevitably contained gaps because the legislature could not foresee all situations, present or future. Gény therefore distinguished between pure interpretation and "free scientific research."<sup>38</sup> What he described as pure interpretation was basically a

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33. On these methods of interpretation, see Rieg, "Rapport Français," in XXIX Travaux de l'Association Henri Capitant, *L'interprétation par le juge des règles écrites* 70-85 (1978). Rieg describes a fourth method of interpretation (the teleological), not utilized by the Exigetical School, but which subsequently obtained prominence. See *infra* text accompanying note 48.

34. Pound, *Common Law and Legislation*, 21 Harv. L. Rev. 383 (1908).

35. For a striking exception, see *Moragne v. States Marine Line*, 398 U.S. 375 (1970), where Justice Harlan reasoned by analogy from the closest wrongful death statute to decide a maritime death case that fell between the statutory cracks. Note, *The Legitimacy of Civil Law Reasoning in the Common Law: Justice Harlan's Contribution*, 82 Yale L.J. 258 (1972).

36. 1 Gény, *Méthode*, *supra* note 16, n° 48, at 107.

37. 1 *id.* n° 35, at 70.

38. 1 *id.* n° 1, at 2-3 and 2 *id.* n° 155, at 74. The French term is "la libre recherche scientifique."

refined version of what the Exigetical School was already doing, but with the frank acknowledgement that traditional methods of interpretation sometimes did not produce an answer. For those matters on which the legislator had no discernible intent, the interpreter must function like a legislator and formulate a legal rule to cover the situation.<sup>39</sup> In the latter part of his study, Gény addressed the question of how judges should exercise in an objective scientific fashion the lawmaking power the Code left them, thus reducing to a minimum the arbitrariness of any personal contribution. Gény believed this endeavor to be the more important part of his work, and he subsequently devoted a separate four-volume treatise to it.<sup>40</sup>

For Gény the principal defect in the traditional method was that it prevented any progress in the law.<sup>41</sup> If the judges refused to make new law, the legislature would need constantly to intervene to perfect the law, something nineteenth century legislators had shown themselves uninterested in doing.<sup>42</sup> Despite this concern for the development of the law, Gény's work was nevertheless profoundly conservative. He recognized the superiority of the traditional methods of interpretation in assuring greater certainty and stability and suggested in a number of places that the additional, back-up technique of free scientific research would not be necessary very often, which was perhaps just as well because it did pose dangers of arbitrariness if misused.<sup>43</sup>

Gény's greatest contribution was perhaps that of frankness. He criticized traditional commentators for constructing complex edifices to fit into the Code's framework new phenomena like life insurance, which the Code's drafters had never heard of and for which the Code, therefore, contained no provisions. Once the courts recognized the existence of that gap, they could freely develop their own rules to fill it because the new institution of life insurance was at least consistent with the general principle of freedom of contract recognized by many Code articles.<sup>44</sup>

But the genie that Gény had let out of the bottle could not be so easily contained. At the end of the nineteenth century the feeling was widespread that conditions of life in France had greatly changed since the time of Napoleon. The word most often used to describe the changes

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39. 1 *id.* n° 85, at 212.

40. F. Gény, *Science et technique en droit privé positif* (4 vols. 1914-1924). Gény's work had a considerable influence on Cardozo, who cited Gény eleven times in *The Nature of the Judicial Process* (1921).

41. 1 Gény, *Méthode*, *supra* note 16, n° 33, at 65.

42. 1 *id.* n° 50, at 105.

43. See, e.g., 2 *id.* n° 155, at 74-76.

44. 1 *id.* n°° 63 to 68 and 73, at 131-47 and 160-64.

was "machinism."<sup>45</sup> In the France of 1890s people recognized that in work places and in public places there were a lot more machines around than at the time of Napoleon, and that those machines often killed or maimed human beings. That new social fact led many jurists to question the adequacy of the provisions of the Code on tort liability, which derived from a pre-industrial era and which denied compensation to a distressingly large number of accident victims. A movement developed to convince the courts to revivify articles 1382 to 1386, and to adapt them to the new social realities. In other words, the mood shifted toward an interpretation providing more generous and just compensation to injured workers and other accident victims.

These reformers saw a potential ally in Géný, and Géný naturally had some interest in their efforts to update the Code through judicial action. The circumstances under which the first (1899) edition of Géný's work appeared confirmed this impression of a natural alliance. In an ebullient preface, Raymond Saleilles, one of the most prominent reforming law professors of the time, argued that the law (that is, the Code), if it were to remain just, must "yield" before transformed economic and social conditions.<sup>46</sup> Saleilles closed his preface by paraphrasing the German scholar Rudolf Ihering's famous motto ("Through the Civil Code, but beyond the Civil Code") to make it more provocative still: "Beyond the Civil Code but through the Civil Code."<sup>47</sup>

The views of Saleilles on the evolution of Code provisions to accommodate new social and economic conditions provide an example of teleological interpretation, a fourth method of interpretation described in most modern French works on Code interpretation.<sup>48</sup> Under the teleological approach, courts interpret Code provisions in light of contemporary social needs. In 1904 this approach received some striking extrajudicial support from Ballot-Beaupré, the first president (chief judge) of the Court of Cassation (France's highest court). In an address on the occasion of the Code's centenary, Ballot-Beaupré asserted that the courts, as long as they did not violate the letter of the Code, should interpret its broad provisions "generously and humanely so as to adapt

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45. Colliard, "La machine et le droit privé contemporain," in *1 Le droit privé français au milieu du XX siècle: Etudes offertes à Georges Ripert* 115 (1954) [hereinafter cited as *Etudes Ripert*].

46. Saleilles, "Preface" to 1 Géný, *Méthode*, supra note 16, at xii-xxv (reproducing preface to first edition). The Mayda translation also contains the Saleilles preface.

47. 1 *id.* at xxv.

48. See Rieg, supra note 33, at 83-84. The three others are the grammatical, historical, and logical methods of interpretation developed by the Exigetical School. See supra text accompanying notes 34-35.

the text to the realities and needs of modern life."<sup>49</sup> According to Ballot-Beaupré, the courts should not struggle to ascertain and implement the intent of the legislature that promulgated the law, but the intent of the present legislature. Under this teleological approach, the relevant question is what the current legislative body would do if it were confronted by the problem before the court.

While some may have understood Géný to be saying the same thing, his views were in fact far more conservative. He allowed judges to engage in free scientific research, his version of the teleological approach, only if the traditional methods of interpretation failed to uncover any discernible legislative intent. Thus, judges had to struggle to ascertain the intent of past lawmakers and had to respect that intent when they found it.<sup>50</sup> Giving judges greater freedom by allowing them to disregard "the will" of the drafters would, according to Géný, result in nothing less than the destruction of that precision and stability that were the principal merit and striking advantage of legislated law. Statutory texts were not empty vessels into which one could put anything one wanted, but expressions of the subjective will of the lawmaker.<sup>51</sup> Free scientific research was a last resort for the courts in deciding cases unforeseen by the lawmaker, not a golden opportunity for law reform by judges.<sup>52</sup> That technique simply allowed judges to obey article 4 of the Civil Code, which commanded them, on pain of punishment for a denial of justice, to decide all cases before them despite any claimed obscurity, silence, or insufficiency in the law.

### C. *The Role of the Courts*

In civil-law jurisdictions, scholars traditionally have played a major role in the development and interpretation of the law.<sup>53</sup> Creative or systematic legal analysis appears in academic publications but very rarely

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49. Ballot-Beaupré, *Le centenaire du Code civil* 27 (1904), as reprinted in 2 Géný, *Méthode*, supra note 16, n° 190, at 250 n.1.

50. See the rebuke administered by Géný to two scholarly "neophytes" for brushing aside the 1804 legislature's views on the role of fault as the basis of tort liability in their "zeal" to establish more just reparation for accident victims. Géný, *Risques et responsabilité*, 1902 *Rev. tri. dr. civ.* 812, 845. [The *Revue trimestrielle de droit civil* is the leading French journal on private civil law. 1902 was the year of its founding].

51. 1 Géný, *Méthode*, supra note 16, n° 97, at 263. In that section of the 1919 edition Géný condemns both Ballot-Beaupré and the German Historical School of Savigny for neglecting the "incontestable role" of the lawmaker's original intent.

52. For a similar analysis contrasting Géný's method with the brand of "evolutive" interpretation advocated by Saleilles and company, see R. David, *Le droit français* 143-49 (1960). For a translation, see R. David, *French Law: Its Structure, Sources, and Methodology* (1972).

53. J. Merryman, *The Civil Law Tradition* 56-60 (2d ed. 1985).

in judicial decisions. Such is certainly the case with respect to theories of statutory interpretation. The French Supreme Court, the Court of Cassation, has never discussed *how* it should interpret the Code. Nevertheless, what it does in deciding cases is more important than the abstract theorizing of academics. It is also more interesting from a common-law perspective because it shows us how French judges react to the facts that the real world presents to them for decision. Contemporary French academic writers seemingly agree with this assessment, since most modern treatises, unlike the treatises authored by the members of the Exigetical School, focus on the work product of the French courts rather than on the development of some overall system for making sense out of the Code.

The Court of Cassation predated the Civil Code of 1804 by fourteen years, and its early history reflects the revolutionary distrust of judicial lawmaking. In the summer of 1790, the Constituent Assembly had created a system of local trial courts and had instructed the judges to address themselves to the legislature if they believed it necessary to interpret a law or to make a new one.<sup>54</sup> This reliance, for insuring the correct implementation of the law, on the judges' voluntarily referring doubtful cases to the legislature proved short-lived. Before the end of 1790, the Constituent Assembly established a new supreme court called the Tribunal of Cassation (renamed the Court of Cassation in 1807) to insure the correct, or at least the uniform, application of the law by the trial courts.<sup>55</sup> The new Court's role was strictly that of a policeman. It could not decide any case brought before it but could merely determine whether the lower court had properly applied the law. If it had, the Court of Cassation rejected the losing party's petition (*pouvoir*) against the judgment below; if it had not, the Court of Cassation merely annulled the judgment and remanded the case for a new decision by another trial court.<sup>56</sup> The new Court's name derived from this authority to annul ("casser") lower court judgments that violated the law.

The revolutionary Constituent Assembly certainly did not expect its new creation to interpret, much less make, any law. The authority to annul lower court judgments that violated the law did not include the

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54. Law of August 16-24, 1790, tit. II, art. 12. See *supra* note 17 for present codification.

55. Law of November 27-December 1, 1790, as discussed in G. Sautel, *Histoire des institutions politiques depuis la révolution française* n°° 125 to 127, at 162-64 (6th ed. 1985); 1 H. Solus and R. Perrot, *Droit judiciaire privé* n° 49, at 678 (1961); G. Picca and L. Cobert, *La Cour de cassation* 11-15 (1986).

56. Law of November 27-December 1, 1790, tit. I, arts. 1-3, as reproduced in C. pr. civ. at 626-27 (Appendix on Judicial Organization) (Dalloz Code de procédure civile) (1986).

authority to say what the law was. Any such authority would violate the prohibition, applicable to all judges, against making general regulations. On remand, the trial court remained free to apply the law as it saw fit, subject to the losing party's right to petition the Court of Cassation to annul its judgment for violation of the law. The second trial court could therefore decide the case the same way as had the initial trial court. If that occurred twice in the same case, that is, if two successive trial courts had agreed with the initial trial court, then, in the opinion of the Constituent Assembly, the law was sufficiently uncertain to require interpretation. But, under the prevailing revolutionary ideology, that interpretation could only come from the legislature. The 1790 law establishing the Court of Cassation therefore mandated the referral of such cases to the legislature so that the legislature could make a "decree declaratory of the law."<sup>57</sup>

The Court of Cassation resisted this mandatory referral of questions of interpretation to the legislature, and most modern French authors believe it to have been a violation of the principle of the separation of powers for the legislature to intervene in the decision of individual cases.<sup>58</sup> The Convention, which governed France from 1792 to 1795, abused this power, and, with the passing of revolutionary fervor, the Court of Cassation was gradually able to obtain for itself the last word in deciding cases. The final step occurred in 1837, during the peaceful years of Louis-Philippe's July Monarchy. In that year the legislature, now called the Parliament, enacted a law that established what is basically the present system.<sup>59</sup> Under that system, if the trial court on the first remand decides the case the same way as had the initial trial court, the losing party's second petition goes to the entire Court of Cassation and not just to one of its chambers. The full Court's interpretation of the law then becomes the law of the case binding the trial court on any subsequent remand.<sup>60</sup> In 1967, the French Parliament simplified this process somewhat by allowing for the first time the full Court of Cassation to decide the case on the merits rather than remand for a second time.<sup>61</sup>

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57. G. Sautel, *supra* note 55, n° 126, at 163 (discussing law of November 27-December 1, 1790).

58. *Id.*; H. Solus and R. Perrot, *supra* note 55, n°° 678 and 699, at 600-02 and 616.

59. H. Solus and R. Perrot, *supra* note 55, n° 699, at 616.

60. The press of business before the Court of Cassation, France's only appellate court, has required the appointment of a large number of judges divided into chambers for the decision of cases. The convocation of the full court, all chambers united, or, as it is now called, l'Assemblée Plénière, is an unusual event. The court on remand only rarely rebels against the Court of Cassation's interpretation.

61. J. Vincent and S. Guinchard, *Procédure civile* n° 1085, at 957-58 (6th ed. 1985).

These developments indicate that the Court of Cassation has not stayed within the narrow policing role assigned it by the Constituent Assembly. Ironically, the basis for this expansion appeared in the revolutionary legislation itself. In the 1790 law organizing the judiciary, the Assembly inserted a provision requiring all judicial decrees to state expressly "the grounds that were decisive for the judges."<sup>62</sup> That provision, which also applied to the Court of Cassation when it was subsequently established, broke with the prior practice that treated a judicial decision as an exercise of authority that its authors did not need to justify or explain. As a result of this provision, the Court of Cassation could not annul a lower court judgment without explaining why the judgment violated the law. In explaining why the lower court misapplied the law, the Court of Cassation would necessarily shed some light on the correct interpretation of the law. The interpretation then would influence subsequent courts. Thus, a provision intended to limit the power of judges, became the principal basis for a highly developed system of case law.<sup>63</sup> As French scholars recognize, there can be no case law without reasoned decisions.<sup>64</sup>

#### *D. The Effect of a Judicial Decision*

To understand the impact of the reasoned decision, let us look at *Montagnier v. Leydon*, one of the better-known nineteenth century cases interpreting the Code provisions on tort liability.<sup>65</sup> That case, decided in 1885, involved article 1385, which governs the liability of the owner or user of an animal. That article provided that the owner or user was

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62. Law of August 16-24, 1790, tit. V, art. 15, as quoted in J. Dawson, *Oracles of the Law* 377 (1968).

63. J. Dawson, *Oracles of the Law* 377 (1968).

64. Jestaz, *La jurisprudence: Reflexions sur un malentendu*, 1986 *Dalloz-Sirey* (D.S.) Chr. 9. *Dalloz-Sirey*, generally referred to by the abbreviation "D.S.," is one of the leading privately published French law reporters. Published weekly, it contains a selection of recent judicial decisions with accompanying analytical notes written by law professors, practitioners, and even judges (cited as *Dalloz-Sirey Jurisprudence* or *D.S. Jur.*). In addition, *Dalloz-Sirey* publishes short articles ("chroniques") on topics of contemporary interest (cited as *D.S. Chr.*). Prior to their merger in the early 1950s, *Dalloz* (D., D.P., or D.H.) and *Sirey* (S.) published separate reporters. *Dalloz-Sirey's* leading present-day competitor is *La Semaine Juridique* (cited as *J.C.P.*), which has a similar format.

65. *Montagnier v. Leydon*, Cass, civ., 27 Oct. 1885, 1886 *D.P. Jur. I* 207, 1886 *S. Jur. I* 33. For the text of the decision, see also H. Capitant, *Les grands arrêts de la jurisprudence civile* n° 131, at 438 (8th ed. by A. Weill, et al., 1984). A translation appears in Appendix 3.

French citation form for cases generally does not include the name of the parties, but only the date of the decision (here October 27, 1885) and the identity of the court (here the Civil Chamber of the Court of Cassation). This article has often added the parties' names to the citation to aid the reader's comprehension.



"liable" for any injury caused by the animal regardless of whether the animal remained under his guard or had become lost or had escaped. During the nineteenth century that article generated many law suits because work animals, especially those used to transport persons or goods, were a major cause of personal injuries.

The reported facts in the *Montagnier* case are sketchy at best, as French judicial decisions, especially those of the Court of Cassation, devote little attention to factual background. The Court of Cassation, whose role it is to assure the proper interpretation of the law, does not review trial court findings for evidentiary sufficiency, but leaves all factual matters to the trial courts' unreviewable discretion or, as the French say, to their "sovereign appreciation." Thus, in *Montagnier*, the Court of Cassation tells us only that the trial court (a Court of Appeals)<sup>66</sup> had found that defendant Leydon's mule had dislodged several stones from the top of a wall and that the stones had struck and injured the plaintiff Montagnier. In its judgment the Court of Appeals<sup>67</sup> had found also that the mule had bucked and that Montagnier, seated at the base of the wall, had suffered a broken leg.

The legal issue in *Montagnier* was the meaning of the word "liable" in article 1385. In other words, what was the basis for the liability imposed by that article on the owner of the animal which caused the injury? The Court of Appeals had nonsuited the plaintiff Montagnier because he had not proved any fault on the part of the defendant Leydon. According to the court, the word "liable" in article 1385 meant that the owner or user of the animal was liable if the plaintiff proved some fault under articles 1382 or 1383. These articles, everyone agreed, imposed liability only when the plaintiff established that the defendant's intentional (article 1382) or negligent (article 1383) wrongdoing caused the plaintiff's injury. Under the Court of Appeals' interpretation of article 1385, Montagnier, who could not prove the defendant's fault, obtained no compensation for his broken leg.

Unhappy with that result, Montagnier successfully petitioned the Court of Cassation to annul the judgment below. The Court's one-sentence judgment, written in the classic French style which seeks to make judgments as brief and concise as possible, reached that result

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66. France has traditionally had two levels of trial court jurisdiction and one level of appellate jurisdiction (the Court of Cassation). The trial court whose judgment was before the Court of Cassation in *Montagnier* was in fact a regional Court of Appeals. The Courts of Appeals try cases de novo on "appeal" from the lower-level trial courts (*tribunaux*) found in each department.

67. Both the Dalloz and Sirey reporters reproduced the Court of Appeals' judgment as part of their report of the Court of Cassation's judgment in *Montagnier v. Leydon*.

through syllogistic reasoning.<sup>68</sup> The only authority cited by the Court was article 1385 itself; there were no references to prior judicial decisions or to the views of any scholarly writers.

The Court of Cassation's judgment in *Montagnier* contained three whereas clauses and a concluding clause announcing the disposition of the case. In the opening whereas clause, the Court gave, as the major premise for its syllogism, its own interpretation of the word "liable" in article 1385. That interpretation based the animal owner's liability on a presumption of fault that the owner would find difficult to rebut. According to the Court:

the liability provided by that article rests on a presumption of fault imputable to the owner of the animal which has caused the injury or to the person who was making use of it at the moment of the accident;—and that presumption only yields before the proof of an unforeseeable event [*cas fortuit*] or of a fault committed by the injured party.

In the second whereas clause, the Court supplied the minor premise for its syllogism by reporting the facts found by the Court of Appeals. These facts—namely, Leydon's ownership of the mule that injured Montagnier—made article 1385 the applicable Code provision. Unsurprisingly, in its third whereas clause, the Court of Cassation found that the Court of Appeals had violated article 1385 when it relieved Leydon of the consequences of his liability under that article solely because there was no proof that Leydon was at fault. Annulment followed inexorably, as a matter of deductive logic, from the Court of Cassation's broad interpretation of "liability" in its first whereas clause. The Court of Appeals had violated the law when it had adopted a narrower interpretation.

The Court of Cassation's meager opinion (more properly called a judgment or *arrêt*) prompts several observations from readers familiar with the more discursive style of common-law opinions. First, the Court, in explaining why it annulled the Court of Appeals' judgment, did furnish what it plainly believed to be a correct interpretation of article 1385. The Court of Cassation therefore did not limit its role to that of a policeman annulling incorrect interpretations by the lower courts. Second, the Court made no effort to justify its interpretation of article 1385 or to explain how it arrived at it. The Court simply announced

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68. For the origins of the Court of Cassation's opinion-writing style, see J. Dawson, *Oracles of the Law* 380ff (1968).

the interpretation in formulaic style.<sup>69</sup> To discover the arguments that must have persuaded the Court, one must refer to the report prepared for the Court by one of the participating judges whom the Court designated to serve as *rapporteur*.<sup>70</sup> The report is not part of the Court's judgment; but, as often occurs in leading cases, one of the unofficial reporters (Sirey) does reproduce it in full.

The *rapporteur* in *Montagnier* did little more than state the issue (how the word "liable" should be interpreted) and summarize the arguments of the parties.<sup>71</sup> His report does, however, convey how nineteenth century jurists, during the heyday of the Exigetical School, sought to resolve a major uncertainty raised by the words of a Code provision. Plaintiff's counsel took an historical approach to interpreting article 1385 and cited the special rules on liability for injuries inflicted by animals in Roman law, in the customs of pre-Revolutionary France, and in the writings of French jurists prior to codification. Plainly, the plaintiff did not cite these pre-Code authorities as controlling but invoked them to establish the lawmaker's purpose in treating injuries inflicted by animals in a separate article (article 1385) after the more general articles (articles 1382 and 1383) establishing the fault principle.<sup>72</sup>

The plaintiff's argument was that the Code, like the pre-Code law, contained a special provision on animals because the legislature believed

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69. This practice continues unchanged today. For the analysis of a modern opinion, see F. Schmidt, *The Ratio Decidendi: A Comparative Study of a French, German, and an American Supreme Court Decision* (1965) (Uppsala, Sweden). The Court of Cassation's practice of announcing legal rules without explaining the basis for them has recently provoked some criticism in France. See Touffait and Tunc, *Pour une motivation plus explicite des décisions de justice notamment de celles de la Cour de cassation*, 1974 *Rev. tri. dr. civ.* 493. But no change seems likely to occur.

70. On the origin and role of the *rapporteur*, see J. Dawson, *Oracles of the Law* 321-23, 402-03 (1968).

71. The *rapporteur* in his report often formulates additional arguments (see the discussion of the *rapporteur's* role in the *Jand'heur* case in the text after *infra* note 174), but he never advocates a particular result. In addition to the *rapporteur's* report, the Court of Cassation in *Montagnier* also had before it the written conclusions of its advocate general, but the private reporters did not reproduce that document. The advocate general is a public official associated with the Ministry of Justice who appears on behalf of the law and does argue for a specific result.

72. Géný described approvingly how the Exigetical School used pre-Code authorities in order to ascertain the drafters' intent. 1 Géný, *Méthode*, *supra* note 16, n° 15, at 32-33. Géný interpreted article 7 of the law of 30 ventôse an XII, which seemingly barred their use (see *supra* text accompanying note 24), to do no more than to deprive those authorities of any obligatory force. 1 *id.* n° 53, at 110-111. Use of pre-Code authorities to discover the drafters' purpose makes sense because the commissioners that prepared the initial draft of the Code relied heavily on Pothier, Domat, Bourjon, and the other treatise writers of the Old Regime. 1 G. Marty and P. Reynaud, *Droit civil* n° 69, at 128 (2d ed. 1972).

owners and users were at least presumptively at fault for injuries inflicted by their animals. The inclusion of article 1385 in the Code made no sense unless the legislature intended to establish some special rule more favorable to the injured party than the otherwise applicable general rule of articles 1382 and 1383, which required the injured party to prove fault. In response, defendant's counsel could do no more than cite some general remarks from the Code's legislative history in which the Code's defenders emphasized the fault basis for liability under the Code. More persuasively, the defendant cited four prior decisions of the Court of Cassation that had interpreted article 1385 to require the plaintiff to prove fault.

The plaintiff also argued, in what proved to be the most significant portion of his argument, that the word "liable" did more than just shift the burden of proof to the defendant, which would allow the defendant to avoid liability by proving due care. The plaintiff argued that the defendant's only defense, once the plaintiff proved that the defendant's animal inflicted the injury, would be the establishment of some *force majeure* (understood to mean some unforeseeable and irresistible force exterior to the animal) or some fault imputable to the injured party. The plaintiff advanced two logical arguments to support this position, one an argument *a contrario* and the other an argument by analogy.

The plaintiff's *a contrario* argument derived from article 1384, which made fathers and mothers "liable" for the wrongful acts of their children (article 1384-2°),<sup>73</sup> masters and employers for those of their employees (article 1384-3°), and teachers and artisans for those of their pupils (article 1384-4°). Article 1384-5° then provided that there was no liability if the "father and mother, teachers and artisans, can prove that they could not have prevented the [wrongful] act," that is, they were not at fault. The courts had accepted previously the *a contrario* argument in refusing to allow masters and employers, who were not included within the quoted language, to exonerate themselves for the wrongs of their employees by proving that they had exercised due care in selecting and supervising them. The courts reasoned that the legislature communicated its intent to apply a contrary rule to masters and employers when it did not include them on the list of persons covered by the exoneration provision.<sup>74</sup> The plaintiff sought to extend that interpretation of the employer's liability under article 1384-3° to cover the animal owner's liability under article 1385.

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73. In this paragraph all references are to article 1384 as enacted in 1804. That article remained unchanged in 1885.

74. See 1 *Traité théorique*, supra note 2, n°° 922 to 925, at 1001-04 (emphasizing in addition clear legislative history to exclude masters and employers).

The plaintiff's argument by analogy, on the other hand, derived from article 1733, which held a tenant liable for the destruction of the leased premises by fire unless the tenant established that the fire was caused by an unforeseeable event ("*cas fortuit*") or an irresistible force ("*force majeure*") or by some vice in the construction of the premises. The plaintiff argued that the liability of an animal's owner or user should be the same as that of the tenant. Despite the problems with the analogy (article 1733 appeared to govern a special case of *contractual* liability), several treatise writers had accepted it, as had several lower courts. The plaintiff brought those authorities to the Court of Cassation's attention, and closed with a general reference to the justice of the interpretation advanced.

The Court of Cassation obviously found the plaintiff's grammatical, logical, and historical arguments persuasive. The text of its judgment interpreted article 1385 to establish a presumption of fault which the defendant could not rebut merely by proving due care. To escape liability, the defendant had to show either the fault of the victim or a "*cas fortuit*." While the latter term is potentially ambiguous—the plaintiff had used the term "*force majeure*"—French jurists have normally treated "*cas fortuit*" and "*force majeure*" as synonyms referring to any external force that is both unforeseeable and irresistible.<sup>75</sup> Perhaps the meaning of these terms was a little vague in 1885, but the note writer who analyzed the *Montagnier* case in the Dalloz reporter treated the two terms as synonymous and recognized that the judgment did not allow the defendant to exonerate himself by proving a mere lack of fault.<sup>76</sup> The liability imposed on the animal's owner thus resembles what the common law would call strict liability.

What is the legal effect of the Court of Cassation's interpretation of article 1385 in *Montagnier v. Leydon*? Civil-law systems supposedly do not have any rule of precedent. The law is in the Code and not in the cases; in deciding a case, even lower court judges must apply Code provisions as they interpret them rather than slavishly following the

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75. 2 H. Mazeaud, L. Mazeaud, and J. Mazeaud, *Traité théorique et pratique de la responsabilité civile* n° 1559 to 1561, at 674-76 (6th ed. 1970) (citing many older authorities) [hereinafter cited as 2 *Traité théorique*].

76. 1886 D.P. Jur. I 207. The note writers, or *arrêtistes* as they are called, contribute invaluablely to the development of the law by placing decisions in context. Their case notes, commissioned by the private reporters, appear immediately after (or beneath) the text of the court's judgment and analyze a decision in light of related decisions and of doctrinal writings. The note is all the more valuable because of the absence of any such analysis in the text of the decision itself. Today most *arrêtistes* are professors, but in the nineteenth century they were often practitioners.

interpretations given by the Court of Cassation.<sup>77</sup> In France, a trial court judgment lacks a legal basis and is thus subject to annulment by the Court of Cassation if the only reason given in its support is a prior decision of the Court interpreting the same Code provision.<sup>78</sup>

In reality, no system handling a mass of cases could give its judges the liberty or responsibility of deciding all issues anew. Considerations of efficiency dictate that certain questions be settled. It is therefore not surprising that France has developed a working system of case law.<sup>79</sup> There are reporting systems, parties cite cases to the courts, and the judges are aware of prior cases and try to decide new cases in a consistent fashion. The traditional explanation for this phenomenon is to treat it as a factual one. Cases are at most like customs; courts normally follow them, but they do not bind judges in the same way the written law binds them.<sup>80</sup> Gény, so revolutionary in other respects, only recognized cases as generative of customs; a custom developed only when people changed their behavior to accommodate judicial decisions.<sup>81</sup> The respect given by the courts to prior cases interpreting Code provisions is thus purely a factual matter and not a matter of legal compulsion.

The fate of *Montagnier v. Leydon* demonstrates that the traditional explanation contains a large degree of sophistry. Initially, the case attracted some attention because the Court of Cassation interpreted article 1385 differently than it had in previous cases. The new interpretation signaled a shift from liability based on fault to strict liability. For that reason, the two private reporting services of the day selected the judgment for publication from among the hundreds if not thousands of judgments rendered annually by the courts. But in 1885 there was no way of knowing whether the new interpretation would prevail. The prohibition in the Code's article 5 against the judges making "general regulations" has always been understood to bar, at a minimum, judges announcing a precedent that binds other judges, even lower court judges.<sup>82</sup> In sub-

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77. J. Merryman, *The Civil Law Tradition* 36 (2d ed. 1985).

78. See, e.g., Cass. req., 21 Dec. 1891, 1892 D. Jur. I 543; Cass. crim. 3 Nov. 1955, 1956 D. Jur. I 557 (note Savatier).

79. J. Dawson, *Oracles of the Law* 414-15 (1968). Professor Dawson believes that the French system is defective because it has formulated a kaleidoscope of rules without any effort to organize them into a coherent whole. He places a good part of the blame on the inadequacy of the reasons given by the Court of Cassation in its judgments.

80. 1 A. Colin and H. Capitant, *Traité de droit civil* n°° 295 to 297, at 171-73 (edited by Julliot de la Morandière 1957); S. Belaid, *Essai sur le pouvoir createur et normatif du juge* 58-66 (1974).

81. 2 Gény, *Méthode*, supra note 16, n° 149, at 49-53. Gény cites as an example the development of notarial practices in response to court decisions. To common-law lawyers, describing cases as generating a custom rather than as recognizing what previously was only a custom seems odd.

82. 1 A. Colin and H. Capitant, *Traité de droit civil* n° 339, at 239 (1957).

sequent cases the Court of Cassation could therefore return to its older interpretation; and the lower courts could choose between the old and the new, or perhaps develop a third interpretation.

What happened in the years after 1885 to change this situation was that the Court of Cassation repeated its new formula interpreting the animal owner's liability on numerous occasions and annulled the judgments of those rare lower courts that resisted the new interpretation by adopting the old one.<sup>83</sup> An influential commentator had also supported it, although with some reservations, in a note to one of the few earlier lower court cases adopting what became the *Montagnier* interpretation.<sup>84</sup> The interpretation thus became fixed and beyond challenge; and the few present-day academic writers who bother to challenge its soundness do so, in the words of the leading torts treatise, "without any illusions" about their chances of prevailing.<sup>85</sup>

Modern French jurists have taken a more realistic view on the function of case law. Professor Maury, in perhaps the most influential article on the topic, recognizes that rules announced by the Court of Cassation under the guise of interpreting the Code may acquire the force of law through the "acceptance" of the courts and, to a lesser extent, of scholarly writers.<sup>86</sup> Sometimes that acceptance comes imme-

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83. 2 *Traité théorique*, supra note 75, n° 1132, at 188 n.6 (citing a long string of cases decided between 1886 and 1917).

84. See the note by Labbé accompanying Paris, 23 Feb. 1884, 1886 S. Jur. II 97. Labbé believed that the heavy responsibility imposed on the owners of animals by the new interpretation of article 1385 was more justified in the case of luxury animals kept for the owner's pleasure than in the case of ordinary (and useful) work animals. He nevertheless concluded that if the defendant's animal caused an injury, the defendant could be exonerated only if he proved some other person or force was responsible for the injury. Otherwise, the defendant must have been in some way at fault. Labbé thus attempted to reconcile the new interpretation of article 1385 with the fault principle. Labbé (a practitioner) was the most distinguished of the nineteenth century *arrêtistes*. Meynial, "Les recueils d'arrêts et les arrêtistes," in 1 *Le Code civil: Livre du centenaire* 173-204 (1904).

85. 2 *Traité théorique*, supra note 75, n° 1132, at 188. The logical arguments against the *Montagnier* interpretation of "liable" are particularly strong. The analogy with the tenant's liability for fire is untenable because that obligation is based on contract (i.e., on an obligation that the tenant voluntarily assumed upon entering into the lease) and covers only the special case of losses to the premises caused by fire. For all other losses, article 1732 provides that the tenant can exonerate himself by proving the absence of fault. Capitant, "De la preuve que doit administrer le gardien d'une chose en cas où il est actionné en responsabilité," 1937 D.H. Chr. 54. The argument *a contrario* fares little better because the special provision in article 1384-5° for parents, teachers, and artisans only supports a negative inference for the other categories of persons mentioned earlier in that article and not for animal owners covered by article 1385. 2 *Traité théorique*, supra note 75, n° 1128, at 185-86.

86. Maury, "Observations sur la jurisprudence en tant que source de droit," in 1 *Etudes Ripert*, supra note 45, at 28, 43-44.

diately, while at other times it comes only with repetition, or after the Court of Cassation has broken the resistance of the lower courts to the new rule.<sup>87</sup> In either case, once a consensus has developed in favor of a rule, the judges' liberty of interpretation (at least for lower court judges) is only the liberty to decide a case wrongly ("celle de mal faire"), and thus be reversed.<sup>88</sup> To Professor Maury, therefore, a well-established interpretation of a Code provision, such as the interpretation of article 1385 in *Montagnier*, may become a binding rule of law, at least until a change in conditions or in the judges' perception of them leads the Court of Cassation to change its mind.<sup>89</sup>

In two well-known articles, Professors Boulanger and Dupeyroux have carried Professor Maury's arguments one step further. To the former, the fixed interpretations which Maury analyzed as legal rules really become part of the statutory text itself, if not a substitute for the text.<sup>90</sup> The text "disappears under its interpretation" and the "formula manufactured by the judgment is utilized as if it were the text of the law itself."<sup>91</sup> To Boulanger, case law often adds to or enriches the statutory text, and the courts therefore exercise a creative, lawmaking power when they interpret a text.<sup>92</sup>

Professor Dupeyroux likewise accepted Professor Maury's analysis as a correct description of the situation, but he argued that the judges improperly had arrogated legislative power to themselves in giving binding effect to case-law rules.<sup>93</sup> Dupeyroux demonstrated his point by arguing that there were no longer any differences from the litigant's perspective between statutory rules and case-law rules. Both now had the same binding or legal effect.<sup>94</sup> For Dupeyroux, case rules that bound subsequent judges, even lower court judges, were "general regulations" forbidden to the judiciary by the Constituent Assembly of 1790 and by article 5 of the Civil Code.<sup>95</sup> Most interpreters of article 5 had rationalized that judges did not make "general regulations" in deciding particular cases because the rules announced by the judges had no binding effect in future cases. The judges were, in Portalis' words, only lawmakers

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87. Id. at 31, 44.

88. Id. at 47.

89. Id.

90. Boulanger, *Notations sur le pouvoir créateur de la jurisprudence civile*, 1961 *Rev. tri. dr. civ.* 417.

91. Id. at 426.

92. Id. at 422-25.

93. Dupeyroux, "La jurisprudence, source abusive de droit," in 2 *Mélanges offerts à Jacques Maury* 349 (1960).

94. Id. at 359.

95. Id. at 351.



for "particular cases."<sup>96</sup> Dupeyroux did not believe that the utterances of judges should gain any additional authority through repetition.<sup>97</sup> Thus, the development of case-law rules violated article 5.

Professor Dupeyroux's observation on the comparable effect of statutory and case-law rules certainly seems applicable to article 1385 and *Montagnier*. By the end of the nineteenth century, litigants and their lawyers in animal tort cases realized that the controlling rule resided not in the text of article 1385 but in the *Montagnier* formula for interpreting "liable," a formula applied by the courts in a very large number of cases. What surprises the American observer is more the rigidity of the Court's formula, the encapsulating of the formula into a text that becomes almost as fixed as the statute itself, and not the Court of Cassation's assumption of a creative, lawmaking role. After all, the word "liable" required some interpretation, and the *Montagnier* interpretation is not necessarily inconsistent with the lawmakers' purpose. The Code's drafters plainly intended some special regime favorable to victims; and the regime created by the Court of Cassation is not necessarily inconsistent with the fault principle, which did seem uppermost in the minds of the drafters of articles 1382 to 1386.

### III. THE DISCOVERY OF ARTICLE 1384-1° BY THE COURT OF CASSATION

#### A. *Exploding Boilers: the Teffaine Case*

Work animals, a major cause of personal injuries during the nineteenth century, gradually disappeared from factories and city streets after the turn of the century, and article 1385, therefore, received fewer and fewer direct applications by the courts. Today injuries inflicted by animals, other than by wild animals to which article 1385 never applied anyway, are a rarity. The *Montagnier* interpretation of liability under article 1385 nevertheless had an impact beyond the confines of that article because many jurists at the end of the last century read it to embody a new theory of responsibility. That theory based tort liability on the objective creation of risk rather than on subjective fault. Its adherents argued that it was not appropriate in an industrialized age to impose liability only for proven fault. Rather, persons who profited

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96. J-M Portalis, Discours préliminaire, in 13 P. Fenet, Recueil complet des travaux préparatoires du Code civil 469, 476 (1827).

97. Professor Maury might respond that the traditional interpretation of article 5 only barred judges in a particular case from binding other judges—compare the common-law treatment of the first decision on issue as a binding precedent—and did not bar the gradual acceptance of a settled interpretation.

from an injury-producing activity, usually large business enterprises, should compensate for all injuries inflicted by that activity.<sup>98</sup>

Commentators today believe that the flowering of the risk theory at the turn of the century was largely a response to the problem of industrial accidents.<sup>99</sup> The theory certainly had its greatest appeal in that domain. It did not appear just for factory owners or other employers to profit from the labor of their employees and then refuse to compensate them for the on-the-job injuries that inevitably resulted. Employers were, nevertheless, able to escape liability for most employee injuries under the interpretations of articles 1382 to 1386 that prevailed until the *Teffaine* decision in 1896. Unless the injury was caused by an animal (article 1385) or by the collapse of a building (article 1386), the injured employee could sue only under articles 1382 or 1383, which required the injured party to prove fault. That burden of proof was difficult if not impossible to meet in the normal case of a workplace injury caused by a machine. The courts required not only that the injured worker establish some culpable act or omission by the employer, but also that he prove how the exercise of greater care by the employer would have avoided the worker's injury. Many injured employees received no compensation because the cause of their injury was unknown, or at least not connectable to some specific, proven fault of the employer.<sup>100</sup> By the end of the nineteenth century, that result appeared intolerable to a majority of the French.

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98. On the origins of this theory of risk, see 1 *Traité théorique*, supra note 2, n° 339 to 349, at 431-38; A. Weill and F. Terré, *Droit civil: Les obligations* n° 685 to 690, at 756-59 (3d ed. 1980); L. Husson, *Les transformations de la responsabilité: Etude sur la pensée juridique* 131-52 (1947); 1 R. Savatier, *Les métamorphoses économiques et sociales du droit civil d'aujourd'hui: Panorama des mutations* n° 274 to 307, at 332-67 (3d ed. 1964).

The originators of the theory were Professor Raymond Saleilles and Louis Josserand whose books on the topic first appeared in 1897. See R. Saleilles, *Les accidents du travail et la responsabilité civile* (1897) and L. Josserand, *De la responsabilité du fait des choses inanimées* (1897). For the translation of some excerpts, see R. von Mehren and J. Gordley, *The Civil Law System* 600-11 (2d ed. 1977).

99. 1 *Traité théorique*, supra note 2, n° 344, at 433.

100. For a similar argument by Saleilles condemning the nineteenth century interpretation of the texts, see his note approving the *Teffaine* decision in 1897 *D. Jur. I* 433 (note Saleilles).

Present-day French writers acknowledge that nineteenth century courts and treatise writers often defined fault too narrowly and too subjectively. Some have suggested that if the courts had not discovered the guardian's liability for things under article 1384-1°, they would have broadened the definition of fault under articles 1382 and 1383 to include doctrines like our *res ipsa loquitur*. The Belgian Court of Cassation, interpreting the very same language, took that approach at the turn of the century and never adopted the French invention of liability under article 1384-1° for injuries inflicted by things. See 4 J. Carbonnier, *Droit civil: Les obligations* n° 110, at 422-25 (10th ed. 1979). The French Civil Code has been in force in Belgium since 1804.

The difficulty faced by the adherents of the theory of risk was to find some basis for it in the Code. That task was not an easy one, because the Code seemingly adopted a fault-based system. Even the special provisions for injuries caused by animals (article 1385) or by the collapse of a building (article 1386) could be interpreted, consistently with the fault principle, to do no more than identify situations where the presence of fault was likely and a presumption of fault justifiable. The dilemma facing the reformers seemingly vindicated the principal argument against codification advanced by the great early nineteenth century German scholar Savigny and the Historical School he founded. According to the Historical School, codification stopped the progress of the law, which otherwise would continue to evolve so as to reflect the spirit and consciousness of the people.

To the reformers of the 1890s, the Code's fault-based articles on tort liability threatened to block any evolution of the law towards broader liability based on risk creation. That evolution was desirable if not inevitable because both popular mentalities and economic conditions had changed since 1804. The fault-based Code texts, largely drawn from Pothier, Domat, and the other academic treatise writers of the seventeenth and eighteenth centuries, embodied the Enlightenment philosophy of individual natural rights untempered by any concern for social justice. Under the Third French Republic, on the other hand, at least by the 1880s after the true Republicans had wrested control from the divided monarchists, concern for the downtrodden and suffering poor, now perceived more as victims, was higher on the public agenda. The advance of industrialization also produced more injuries and deaths, especially among the working class. While the Code's fault-based approach to tort liability may have been appropriate for less mechanized times, to a growing number of observers it seemed manifestly inappropriate for a highly industrialized society.<sup>101</sup>

The *Montagnier* interpretation of an owner's responsibility for injury-producing animals did give the reformers some encouragement because it could be read to base liability on risk creation rather than on fault. If the responsibility were fault-based, then the owner certainly should have escaped liability upon proof of due care. The *Montagnier* court's formula seemingly did not allow that but required the owner to prove something more (a "*cas fortuit*") to avoid liability. Therefore, the basis for liability was that the owner who profits from an animal should also

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101. 1 *Traité théorique*, supra note 2, n° 345, at 434-35; R. Saleilles, "Le Code civil et la méthode historique," in 1 *Le Code civil: Livre du centenaire 1804-1904*, at 95 (1904). By 1904, Saleilles believed that the Court of Cassation had resolved the dilemma posed by codification in favor of the reformers. That Court's creative interpretation of Code provisions insured the continuing evolution of the law.

make reparation for any injuries caused by the animal. Indeed, in one of the few snippets of legislative history which supports the risk theory, Bertrand-de-Greuille had defended article 1385 on that very basis.<sup>102</sup>

The reformers' difficulty was that article 1385 applied only to animals and not to machines. Article 1386, on the owner's responsibility for the collapse of a building, if interpreted, as seemed likely, to be at least as favorable to the victim, was potentially more helpful because machines in factories were often attached to buildings. That article, however, imposed liability only for the "collapse" of a building; it seemed quite strained to find, as some courts managed to, the "collapse of a building" in a machine that exploded or otherwise misbehaved so as to injure a worker or passerby.<sup>103</sup>

In 1896, the Court of Cassation resolved this difficulty in favor of the victim in its well-known judgment in the *Teffaine* case.<sup>104</sup> In that case a boiler had exploded in the tugboat "Marie," killing a mechanic named Teffaine employed by the the boat's owners. An official investigation established that a defect attributable to the manufacturer was the cause of the explosion. Teffaine's widow sued the tugboat's owners, who in turn brought a warranty action to obtain indemnification for any loss suffered against the manufacturer from whom they had purchased the boiler. The Court of Appeals (the second-level trial court) found that neither Teffaine nor the tugboat's owners were at fault, but nevertheless found the owners liable to the widow under article 1386. The Court did not apply the literal terms of article 1386 to find that the explosion of the boiler constituted the collapse of a building but reasoned, in a sweeping analogy, that if it was just to hold the owner of collapsing building strictly liable for injuries that resulted, it was also just to hold the owner of an exploding boiler. The Court then found the manufacturer had a contractual obligation to indemnify the owners for their loss.<sup>105</sup>

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102. In defending article 1385 before the Tribunat (an advisory legislative body), Bertrand-de-Greuille invoked the general principle that "nothing that belongs to one person may injure another with impunity." 13 P. Fenet, *Recueil complet des travaux préparatoires du Code civil* 477 (1827).

103. For an example of such a strained interpretation, see Cass. civ., 19 Apr. 1887, 1887 S. Jur. I 217. Even more remarkably, a trial court (the Paris Court of Appeals) interpreted the collapse of a building to cover a rotted tree branch that fell on a passerby. Paris, 20 Aug. 1877, 1878 S. Jur. II 48.

104. Cass. civ., 16 June 1896, 1897 D. Jur. I 433 (note Saleilles), 1897 S. Jur., I 17 (note Esmein). For an English translation, see R. von Mehren and J. Gordley, *The Civil Law System* 608-10 (2d ed. 1977).

105. For the judgment of the Court of Appeal, see the Dalloz reporter cited in *supra* note 104. The Court of Appeals also had found the employer contractually liable to Teffaine's widow under an implied contract to furnish the employee a safe place to work. The Court of Cassation never approved that contractual basis for recovery.

The tugboat's owners and the boiler manufacturer (who appeared to be the real party in interest) petitioned the Court of Cassation. The Court's respected Advocate General Sarrut<sup>106</sup> recommended in his conclusions that the Court annul the judgment below. To Sarrut, it was self-evident that article 1386 did not apply because a tugboat was moveable personal property, not a building.

Teffaine's widow also lacked confidence in the trial court's analogical interpretation of article 1386, apparently, because she sought to find a legal basis for the Court of Appeals' judgment by substituting a new ground for that given by the court. The new ground was article 1384-1°, which held a person liable for the act "of things that he has under his guard." Here the injury-producing thing was the boiler, and on the facts of the case it was clear that the tugboat's owners were the guardians of the boat and its boiler.

Sarrut responded that article 1384-1° did not establish any general liability for injuries inflicted by things under one's guard. The paragraph did not have any substantive content; it did no more than introduce the special rules in articles 1385 and 1386 that modified the fault principle for injuries inflicted by animals and by collapsing buildings. In other words, the only "things" covered by article 1384-1° were the animals and collapsing buildings more specifically provided for in the two articles that followed. The widow Teffaine, therefore, could not invoke article 1384-1° because that transition paragraph did not provide an independent basis for tort liability.

Sarrut's interpretation of article 1384-1° was the accepted nineteenth century interpretation. No court had found any basis in that paragraph for imposing liability on the guardian of a thing. The commentators were almost unanimous in agreeing that the paragraph merely introduced the special rules that followed for imposing liability on the owners of animals and collapsing buildings.<sup>107</sup>

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106. The advocate general is a public official who represents the interest of the law before the Court of Cassation. In his written conclusions the advocate general, unlike the *rapporteur* in his report, takes a position on the merits. The private reporters occasionally publish the advocate general's conclusions. In *Teffaine*, Dalloz published a summary of Sarrut's conclusions. On Sarrut's high reputation as an advocate whom the Court of Cassation normally followed, see the conclusions of Advocate General Matter in *Jand'heur II*, *infra* note 146.

107. In an earlier exploding boiler case, a well-known commentator had proposed a more broadly based objective responsibility for injuries caused by things. In that case, the Court of Cassation had upheld the trial court's nonsuit of the plaintiff for failure to prove fault under articles 1382 and 1383. The commentator labelled his idea "extra-judicial," but he did recognize that it was possible to interpret article 1384-1° to cover all inanimate things. Cass. civ., 19 July 1870, 1871 S. Jur. I 9 (note attributed to Labbé).

In *Teffaine*, the Court of Cassation nevertheless found in article 1384-1° a legal basis for the Court of Appeals' judgment. Unfortunately, the Court did not bother to explain how it arrived at that new interpretation or to specify very clearly on what basis the guardian of the injury-producing thing could seek exoneration. The judgment merely confirmed that the cause of the explosion that killed *Teffaine* was a defect in the construction of the boiler. According to the Court, that fact excluded any possibility of "*cas fortuit*" or "*force majeure*" and thus made the tugboat's owners, who were also its guardians, liable for *Teffaine*'s death. The judgment added that the owners could not escape liability by proving the manufacturer's fault or the hidden nature of the defect.

The *Teffaine* judgment caused a sensation at the time because it seemingly recognized a new basis for tort liability that was general in scope and not limited to the special cases of animals and collapsing buildings. In addition to the traditional fault-based liability, there was now a new system of liability based on the guard of any injury-producing thing. This new basis of liability was apparently more favorable to the injured party, because although the role of defendant's fault was unclear, it received much less emphasis.

Enthusiastically defended on its merits by the adherents of the risk theory,<sup>108</sup> the *Teffaine* decision served as the catalyst that finally persuaded the French Parliament in 1898 to adopt France's first Workmen's Compensation Law, following Bismarckian Germany's example.<sup>109</sup> That law, plainly based on the risk theory, required employers to compensate employees for on-the-job injuries according to a system of fixed indemnities and barred any suits by employees or their families under the Civil Code. The new law thus excluded industrial accident cases from articles 1382 to 1386 of the Code.

The 1898 Workmen's Compensation Law reduced the practical importance of the Court of Cassation's novel interpretation of article 1384-1°. The correctness of that interpretation nevertheless generated a substantial debate. In a series of notes published in the *Sirey* reporter,

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The late nineteenth century Belgian jurist Laurent had advanced a similar interpretation of article 1384-1° in his treatise on the Civil Code. 20 Laurent, *Principes du droit civil français* n° 639 (1888).

108. See the books by Saleilles and Josserand cited in *supra* note 98 and Saleilles's lengthy defense of the judgment in his well-known note in the *Dalloz* reporter.

109. Law of 9 April 1898, *Sirey Lois Annotées* 761-803 (1899). For a partial translation, see R. von Mehren and J. Gordley, *The Civil Law System* 611-12 (2d ed. 1977).

Professor A. Esmein<sup>110</sup> challenged as inconsistent with the intent of the Code's drafters the *Teffaine* interpretation of article 1384-1°. Esmein's main point was that the drafters would have given some specific notice or warning of what they were doing if they had intended to establish a new general theory of liability not based exclusively on fault. Esmein emphasized the potential breadth of the newly discovered responsibility of guardians for injuries caused by things under their guard and warned that liability under article 1384-1° for the act of a thing could all but supersede fault-based liability under articles 1382 and 1383 as the principal basis for tort liability. Not only was article 1384-1° more favorable to the injured party, but "the number of inanimate things which could be harmful has singularly increased in our days."<sup>111</sup> Prophetically, Esmein included motor vehicles in his list of harm-producing things.

The skimpy legislative history of articles 1382 to 1386 certainly supports Esmein's argument.<sup>112</sup> The three designated defenders of articles 1382 to 1386 before the Consulate's legislative bodies all described a system of fault-based liability. Tarrible did not recognize any exception to the fault principle and explicitly stated that the special liabilities imposed by articles 1384, 1385, and 1386 all required "some fault or imprudence, however light might be its influence on the damage inflicted."<sup>113</sup> On the other hand, Bertrand-de-Greuille recognized that the provisions of those articles did depart in some fashion from the general fault principle found in article 1382. He described how under article 1384 parents, artisans, teachers, and employers were guarantors for the wrongs inflicted by their children, apprentices, pupils, and employees, and how under articles 1385 and 1386 the owners of animals and

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110. Professor Esmein's critical note on *Teffaine* appeared in 1897 S. Jur. I 17. The majority of the discussion in the text derives from his later note criticizing Cass. civ., 25 Mar. 1908, 1910 S. Jur. I 17 (note Esmein). See also Cass. civ., 30 Mar. 1897, 1898 S. Jur. I 65 (note Esmein) (*Grange* case).

111. 1910 S. Jur. I 17 (note Esmein), at 18.

112. The legislative history of the Civil Code, first published in 1827, fills fifteen thick volumes. See P. Fenet, *Recueil complet des travaux préparatoires du Code civil* (1827). The published materials consist mainly of two things: the debate in Napoleon's Council of State on the commissioners' draft Code and the presentations before the legislature (the Tribunal and the Corps législatif) by those charged with defending the Code as approved by the Council of State. The legislative history of the present articles on quasi-contract and tort (articles 1370 to 1386) fills only forty pages of volume 13 of Fenet (pages 450-491), and most of those pages concern quasi-contract. The articles on tort liability prompted no significant debate in the Council of State, and the only legislative history normally considered relevant are the presentations by Treilhard (before the Corps législatif), Bertrand-de-Greuille (before the Tribunal), and Tarrible (before the Corps législatif). For translations of significant excerpts, see R. von Mehren and J. Gordley, *The Civil Law System* 594-98 (2d ed. 1977).

113. 13 P. Fenet, *supra* note 112, at 486.

buildings had a special responsibility to prevent injury to others.<sup>114</sup> But Bertrand-de-Greuille, like Tarrible, made no specific reference to article 1384-1° and treated it as a transitional provision between the general fault principle of articles 1382 and 1383 and the special rules for animals and buildings in articles 1385 and 1386.

The legislative history, as Professor Esmein argued, further undermines the *Teffaine* interpretation of article 1384-1°, because what is now article 1385 was the sixth and final paragraph of article 1384 in the draft Code prepared by the four commissioners and presented to the Council of State.<sup>115</sup> The drafters thus referred in the opening paragraph of 1384 to a person's liability for the acts of others and of things under his guard because the article itself specified those special situations where one was liable for what others (that is, one's children, apprentices, pupils, or employees) did or for what one's things (that is, one's animals) did. According to Esmein, the Council of State did not intend any substantive change when it created what is now article 1385 as a separate article; it merely intended to shorten the overly long article 1384.<sup>116</sup>

Professor Esmein's argument did not convince the Court of Cassation to abandon its interpretation that article 1384-1° covered inanimate "things" like exploding boilers. The legislature's creation of a risk-based workmen's compensation system outside of the Code also did not convince the Court to limit liability under the Code to cases of proven fault. In other words, the Court did not react to the legislature's action by abandoning any effort to read the risk theory into the Code. The Court did, however, apply its new interpretation of article 1384-1° quite cautiously during the first two decades of the twentieth century. It did so by allowing guardians to exonerate themselves by proving that they were not at fault and by limiting article 1384-1° to things like exploding boilers, which carried within themselves destructive forces that escaped to injure the person or property of another.

In interpreting the guardian's liability under article 1384-1°, the Court of Cassation in *Teffaine* did not repeat the *Montagnier* formula interpreting liability under article 1385. That formula exonerated the animal's owner only upon the owner's proof of a *cas fortuit*. The *Teffaine* Court did not reiterate that formula because the cause of the accident was known: the boiler had exploded and killed *Teffaine* because of a hidden defect in its construction. To impose liability, the Court

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114. 13 Id. 475-77. Treilhard, the third speaker, did no more than summarize the articles.

115. 1910 S. Jur I 17 (note Esmein).

116. For the text of article 1384 (then numbered article 17) as presented to the Council of State, see 13 Fenet, *supra* note 112, at 462. The legislative history supplies no other explanation for the Council's action.



only needed to confirm, as it did, that the hidden defect, found by the Court of Appeals to be the cause of the accident, did not exonerate the boiler's owners and guardians because it did not constitute a *cas fortuit* or *force majeure*. As Saleilles immediately recognized,<sup>117</sup> the Court's reasoning on the particular facts of the case would lead the Court to adopt the *Montagnier* formula in any subsequent case where the cause of the accident was unknown, that is, where the plaintiff could not prove any hidden defect. The defendant could escape liability only by establishing some unforeseeable and irresistible force, which is the standard meaning of *cas fortuit* and *force majeure*.

In addition, the *Teffaine* Court had made clear that a hidden defect did not qualify as a *cas fortuit* or a *force majeure*. Evidently, the unforeseeable and irresistible force must be an external one coming from outside the thing itself to exonerate the guardian. An unexpected bolt of lightning that ignited the boiler might qualify, but an internal defect did not. According to Saleilles, the *Teffaine* interpretation of article 1384-1° did not allow the defendant to escape liability by showing *cas fortuit* in the broad sense of an inevitable accident that the defendant could not have prevented through the exercise of care. The exonerating force must be external, unforeseeable, and irresistible. Thus, under the narrow meaning given *cas fortuit* by the *Teffaine* court, that term did not allow exoneration in any situation not already covered by *force majeure*.

The Court of Cassation, however, promptly changed its mind, which should remind us that in France a single decision, even a recent decision by the Court of Cassation on a new point of law, does not bind subsequent courts as a common law precedent does. It is only the acceptance of an interpretation in a series of decisions that gives judge-made law its force. Thus, the year after *Teffaine*, another chamber of the Court of Cassation adopted a different interpretation of the guardian's liability under article 1384-1°.<sup>118</sup> Once again a boat's boiler had exploded, killing an employee named Grange; but this time the official investigation found that the boat was properly constructed and maintained. The Court of Appeals found the boat's owner and guardian not liable "because it was impossible to determine the cause of the accident which must belong to the category of inevitable accidents escaping all foresight and not engaging any liability."<sup>119</sup> The Court of Cassation rejected the widow Grange's petition because it found no violation of

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117. See Saleilles's note to *Teffaine* in 1897 D. Jur. I 433.

118. Cass. req., 30 Mar. 1897, 1897 D. Jur. I 433 (note Saleilles) (reported with *Teffaine*), 1898 S. Jur. I 65 (note Esmein) (*Grange* case).

119. The Sirey reporter, see *supra* note 118, reproduces the text of the Court of Appeals' judgment in *Grange*.

the law in the lower court's interpretation. Plainly, that interpretation of the guardian's liability under article 1384-1° conflicts with the *Teffaine* interpretation because it exonerates the guardian who exercised due care when the cause of the action remains unknown, while *Teffaine* requires the guardian to prove the specific *cas fortuit* or *force majeure* that caused the accident.

In the years preceding World War I, most courts interpreted article 1384-1° consistently with *Grange*. Indeed, the Court of Cassation, including the Civil Chamber which had decided *Teffaine*, did so on a number of occasions.<sup>120</sup> While the *Grange* interpretation did not develop into a rigid formula, its effect was to exonerate the guardian upon a showing that the accident could not have been prevented by exercising due care. Article 1384-1°, under this interpretation, embodied only a presumption of fault which shifted to the defendant the burden of proof on the issue. The matter remained unsettled, however, and a number of lower courts interpreted article 1384-1° to adopt a risk theory, making it more difficult for the guardian to escape liability.<sup>121</sup> Thus, the interpretation of the guardian's "liability" under article 1384-1° adopted by the majority of the decisions in the years after *Teffaine* did not help accident victims nearly as much as did the established *Montagnier* interpretation of the animal owner's "liability" under article 1385.

The courts also tended to limit article 1384-1° by applying it only to things that carried within themselves destructive forces (like exploding boilers) and not to things that injured while operated by the hand of man (like automobiles).<sup>122</sup> The Court of Cassation, for example, refused to apply article 1384-1° to an automobile that, while driven by a man, killed a pedestrian.<sup>123</sup> This limitation on the coverage of article 1384-1° seemed consistent with the language of the text, which imposed liability for the "act" of a thing. Under this interpretation, the thing itself must contain some defect or vice which releases the injury-producing force. The injury must be attributable to the thing rather than to the person operating it.<sup>124</sup> This limitation, combined with the exclusion by virtue of the workmen's compensation law of industrial accident cases from its coverage, left for article 1384-1° only a narrow range of cases.<sup>125</sup>

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120. A. Weill and F. Terré, *Droit civil: Les obligations* n° 691, at 759-60 (3d ed. 1980).

121. 1 *Traité théorique*, supra note 2, n° 82 to 84, at 84-85.

122. 2 *Traité théorique*, supra note 75, n° 1216, at 326-27.

123. Cass. req., 22 Mar. 1911, 1911 D. Jur. I 354, 1914 S. Jur. I 213.

124. See, on this explanation for the limitation, the note by Savatier in 1920 D. Jur. I 169 (note Savatier) (*The Resins of Bordeaux* case).

125. Savatier, *Le gouvernement des juges en matière de responsabilité civile*, in 1 *Introduction à l'étude du droit comparé: Recueil d'études en l'honneur d'Edouard Lambert* 455, 457 (1938) (hereinafter cited as *Etudes Lambert*).

The paradigmatic case was that of the passerby or adjoining property owner injured by an exploding piece of mechanical equipment.<sup>126</sup>

*B. Spreading Fire: The Resins of Bordeaux Case*

In the early 1920s the Court of Cassation breathed new life into article 1384-1°. The most significant case, at least from the public's perception, was the 1920 decision in *The Resins of Bordeaux*.<sup>127</sup> The defendant railroad in this case used uncovered vats to store resin in the port area of Bordeaux. A fire somehow broke out and ignited the resin, which spread to the adjoining property of the plaintiff and did considerable damage. The plaintiff, after unsuccessfully trying to prove the railroad's fault in setting the fire (the cause of the fire remained unknown), sought to recover from the railroad as guardian of the resin under article 1384-1°. The Court of Appeals refused to apply that article because it found that the plaintiff's injury was not attributable to any defect in the resin, which had merely transmitted the fire.

The Court of Cassation, in an opinion reminiscent of its opinion in *Montagnier*, annulled that judgment for violating article 1384-1°. In its first whereas clause, the Court interpreted article 1384-1° to impose strict liability on the guardian of the injury-producing thing. The guardian could escape liability only by proving that an unforeseeable event or irresistible force caused the injury. According to the Court:

Whereas, the presumption of fault provided by that article against one who has under his guard the inanimate thing which caused the injury may be rebutted only by proof of an unforeseeable event [*cas fortuit*] or an irresistible force [*force majeure*] or other external cause not imputable to the guardian; and it does not suffice to prove that he has committed no fault or that the cause of the injury remains unknown; and it is not necessary that the thing have an inherent defect susceptible of causing the damage because the article [article 1384-1°] attaches liability to the guard of the thing and not to the thing itself.

Given that interpretation of article 1384-1° as the Court's major premise, the result in the case followed inexorably as a matter of deductive logic. The railroad, the guardian of the injury-producing resin, was unable to establish the cause of the fire. The facts found by the Court of Appeals (the trial court) thus fit within the major premise. That match is not surprising because the Court certainly formulated its interpretation to

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126. Cass. civ., 21 Jan. 1919, 1922 D. Jur. I 25 (note Ripert) (locomotive exploded damaging adjoining property).

127. Cass. civ., 16 Nov. 1920, 1920 D. Jur. I 169 (note Savatier), 1922 S. Jur. I 97 (note Hugueney).

be broad enough to encompass the facts of the case. The conclusion readily followed that the railroad, the guardian of the resin, could not escape liability under article 1384-1° by claiming that its flaming resin did not have an internal defect that caused it to ignite, but merely transmitted a fire started elsewhere. Thus, the Court of Appeals violated the law when it refused to apply that article.

The broad interpretation of the guardian's liability in *The Resins of Bordeaux* is significant in at least three respects. First, the Court clearly adopted an expanded version of the *Montagnier* interpretation of liability. In the Court's view, article 1384-1° did more than shift the burden of proof, and the guardian could obtain exoneration only by establishing some cause for the accident not imputable to the guardian. The adherents of the risk theory promptly cried victory.<sup>128</sup> Other more conservative jurists wondered why the rule formulated on liability for animals also applied to inanimate things. Were not animals different because they had a will of their own which justified imposing special responsibilities on their owners?<sup>129</sup> Despite this disagreement on the merits, both sides recognized that the Court of Cassation had now settled the issue.

Second, the Court interpreted article 1384-1° to cover things that did not have within themselves some defect that unleashed a destructive force. This extension, however, was of uncertain scope. What if a spark generated by the tool of a railroad employee had ignited the resin? Could the injured party have recovered from the guardian railroad under article 1384-5°, which required proof of the employee's fault for the employer to be liable?<sup>130</sup> The latter interpretation reflected the prevailing understanding, but it seemed illogical for the injured party to be worse off in the hypothetical case than in the actual case where the cause of the fire on the railroad's property remained unknown. It was, therefore, at least likely that the courts would apply article 1384-1° in both cases. Third, the Court introduced the idea that the liability imposed by article 1384-1° derived not from the nature of the thing, but from the "guard" of the thing. The full significance of this new perception became apparent only later.

*The Resins of Bordeaux* case attracted considerable public attention and awakened large segments of the French public to what the Court of Cassation had accomplished under the guise of interpreting article

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128. See the note by Savatier in the Dalloz reporter cited in *supra* note 127.

129. See the note by Ripert, *supra* note 126, to *The Resins of Bordeaux* and several similar cases.

130. Savatier asked a similar question in his note to *The Resins of Bordeaux* in the Sirey reporter, *supra* note 127.

1384-1°. The potential liability faced by property owners became a matter of public concern. In 1922, two years after the date of the decision, *The Resins of Bordeaux* became the victim of at least a partial legislative overruling.<sup>131</sup> The aftermath of that legislative intervention demonstrates that the French system also encounters problems when case law and statute law interact. It also confirms the wisdom of Portalis' view that a Code should only state general principles and leave the details for the courts to resolve. The French Parliament spurned that advice when, in overreacting to a particular case, it cluttered the Code with a detailed, special interest provision, which fit badly with the remaining legal landscape.

*The Resins of Bordeaux* did not prompt any legislative reconsideration of the new basis for tort liability found in article 1384-1°. That issue had been raised by Professor Ripert, who asked why the tort system should favor an injured party's recovery against the immediate guardian of an injury-producing thing rather than against more remote parties, such as the manufacturer, who were more likely to be the parties really at fault.<sup>132</sup> But that issue was too big or difficult for the legislature to resolve. Rather, the 1922 Parliament addressed a much narrower concern: the potentially horrendous liability of property owners for the spread of fire. Fire insurance companies convinced Parliament that homeowners faced drastic increases in their liability premiums now that they were responsible for injuries caused by fires that either started or spread from their premises, even if they were not at fault. The specter of massive liability when one's property did no more than spread a fire originating elsewhere particularly disturbed the legislature.<sup>133</sup> Parliament responded by amending article 1384 to provide that the owner of immovable or moveable property that "caught fire," or anyone else who had an interest in the property, was responsible for any injury caused by the fire only in cases of proven fault.<sup>134</sup>

Interestingly, the legislature accomplished this partial overruling of *The Resins of Bordeaux* in a way that affirmed the remainder of the Court of Cassation's interpretation of article 1384-1°. Parliament inserted this limitation on liability for fires in two new paragraphs immediately following the eight words in article 1384-1° on which the Court of Cassation had based the guardian's liability for injuries inflicted by

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131. Law of 7 Nov. 1922, 1922 Sirey Lois Annotées 797 (adding new paragraphs 2 and 3 to article 1384).

132. See note by Ripert cited in *supra* note 126.

133. See the committee reports and debate reproduced in 1922 Sirey Lois Annotées 797.

134. Law of Nov. 1922, 1922 Sirey Lois Annotées 797 (adding new paragraphs 2 and 3 to article 1384).

things. The amendment, which opened with the word "however," thus established an exception to the general principle found in article 1384-1°. A person was in general "liable" for the act of "things that he had under his guard." However, guardians or possessors of things that caught fire were liable only if the victim proved fault. Treatise writers have generally agreed that the 1922 legislature implicitly approved by this action the Court of Cassation's discovery in article 1384-1° of a new basis for tort liability.<sup>135</sup> In fashioning an exception for things that catch fire, the legislature recognized the general rule of liability for injuries caused by things under one's guard.

The exception for things that catch fire has attracted sharp academic criticism.<sup>136</sup> Why should the guardians of things that catch fire benefit from an exception to the prevailing strict liability, an exception not available to guardians of things that explode or collapse? Why should the guardian enjoy that benefit even if the fire started on his property, surely a more commonplace occurrence than one's property transmitting a fire started elsewhere? The insurance industry's threat of increased premiums has also provoked disbelief.<sup>137</sup> Did the industry believe that *The Resins of Bordeaux* case would somehow increase the number of fires? If not, and any such argument seems untenable, the amount of fire damage would remain constant. After the 1922 law, property owners who were victims of a spreading fire could no longer recover from property owners earlier in the fire chain unless they could prove fault. More fire victims would need to resort to first-party insurance, which would as a result become more costly. The legislature's limiting the property owner's liability, therefore, did not affect the total amount of fire losses or the total premiums needed to cover them.

The interaction between the general rule in article 1384-1° and the exception in articles 1384-2° and 1384-3° has also produced indefensible results in actual cases. The exception only applies to property "that catches fire." A spark emitted by a locomotive or other machine is not a thing which has caught fire because its burning condition, deliberately produced by man, lacks the destructive qualities necessary for a "fire." Under this grammatical interpretation of article 1384-2°, adjoining property owners whose property the spark ignites can invoke article 1384-1° against the guardian of the offending machine that emitted the

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135. 2 *Traité théorique*, supra note 75, n° 1145, at 200-01; A. Weill and F. Terré, *Droit civil: Les obligations* n° 693 at 761 (3d ed. 1980).

136. 2 *Traité théorique*, supra note 75, n° 1334, at 439 (citing near unanimity of academic writers).

137. See note by P. Esmein to Ass. Plen [Assemblée Plénière of the Court of Cassation], 25 Feb. 1966, 1966 D.S. Jur. I 389.

spark.<sup>138</sup> But what if the spark accidentally ignited some hay or other property on the guardian's premises, and that "fire" then spread to destroy adjoining property? Courts understandably resisted applying the exception, which would require the adjoining property owners to prove fault in order to recover, to these cases. Why should the guardian of a locomotive benefit from the fact that some other thing under its guard transmitted the fire if the origin of the fire was the locomotive's spark? In 1966 the full Court of Cassation nevertheless settled the question in the guardian's favor. The Court interpreted the exception in article 1384-2° to apply whenever the defendant's property "caught fire," regardless of how the fire began.<sup>139</sup> Adjoining property owners injured by the spread of the fire, therefore, had to prove fault to recover.

This interpretation of article 1384-2° appears to be consistent with its language (grammatical and logical interpretation) and the legislative intent (historical interpretation) behind the 1922 amendment. But the irrationality of the distinctions drawn to separate fault-based liability for fires from the strict liability otherwise imposed on guardians of things under article 1384-1° has prompted calls for legislative action, calls that have so far gone unheeded.<sup>140</sup> This specific special interest legislation has proved to have considerable staying power, and the available interpretive techniques do not provide the courts with any means for getting rid of it. Thus, the French courts have respected the legislatively created anomaly of limited liability for fires.

One suspects that the law would have developed more coherently if the courts had continued to interpret the provisions of article 1384-1° addressing the guardian's liability for injuries caused by things without any legislative interference. Once the courts recognized a general responsibility for the act of things, *The Resins of Bordeaux* was, as one commentator recognized, almost a banal application of the principle.<sup>141</sup> After all, the fire did originate on the defendant's premises,<sup>142</sup> although the plaintiff could prove no fault on the defendant's part, and the flaming resin did escape from the defendant's premises to ignite adjoining property. If the resin had served merely as a conduit spreading a fire that had originated elsewhere, a case where the 1922 Parliament evidently believed that strict liability would be unjustified, the result might well have been different under the interpretation given article 1384-1° in *The Resins of Bordeaux*. The Court of Cassation's formula would have

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138. 2 *Traité théorique*, supra note 75, n° 1357, at 446-448.

139. Ass. Plen., 25 Feb. 1966, 1966 D.S. Jur. I 389 (note Esmein).

140. See note by Esmein, supra note 137.

141. See note by Huguency to *The Resins of Bordeaux* in 1922 S. Jur. I 97.

142. For confirmation of this fact, see the earlier judgment of the Court of Appeals of Bordeaux, reported under Cass. civ., 19 Mar. 1912, 1912 D.P. Jur. I 325.

required the lower courts to determine whether the fact that the fire originated elsewhere exonerated the defendant because it was an "external force" that was "unforeseeable" and "irresistible." Sensible application of that formula by the courts would have given property owners sufficient protection.

### C. Motor Vehicle Accidents: The *Jand'heur* Case

The full flowering of the guardian's liability for injuries caused by things under his guard came only with the application of article 1384-1° to injuries inflicted by motor vehicles in motion. That development did not occur until the 1920s, nearly thirty years after the Court of Cassation's discovery of article 1384-1° in *Teffaine*. That delay reflected caution by the courts and the practicing bar in developing an apparent exception to the general rule of fault-based liability. Many jurists initially perceived the exception as applicable only to things with inherent defects that released destructive forces. In those cases the "act of the thing" caused the injury, not the act of the human being who controlled it.<sup>143</sup> On the other hand, injuries inflicted by motor vehicles normally involved some act of the driver and only rarely were attributable to a defect in the vehicle.<sup>144</sup> Thus, courts normally decided motor vehicle accident cases under articles 1382 and 1383; in order to recover, the injured pedestrian or other plaintiff had to prove the driver's fault.

Very few plaintiffs in motor vehicle cases before the early 1920s sought to avoid that burden by invoking article 1384-1°. The *Resins of Bordeaux* case changed the situation. In that case, the Court of Cassation recognized that the basis for liability under article 1384-1° was the defendant's guard of the thing and not any defect in the thing. This new interpretation naturally encouraged pedestrians struck by motor vehicles to sue the vehicle's guardian (usually the owner)<sup>145</sup> under article

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143. In his report in the *Jand'heur II* case, see *infra* note 146, Judge Marc'hadour so explained the Court of Cassation's restrictive interpretation of article 1384-1° from *Grange* until the early 1920s. According to Judge Marc'hadour, the guardian had obtained exoneration in those cases, not by proving lack of fault, but by proving that the injury-producing thing was properly manufactured and maintained.

144. Modern treatise writers have preferred this explanation. See e.g., A. Weill and F. Terré, *Droit civil: Les obligations* n° 691, at 759-60 (3d ed. 1980).

145. The "guard" and the ownership of a thing are two different concepts, but in the great majority of cases they overlap. The courts define the "guard" as the use, direction, and control of the thing and not as its possession. B. Starck, *Droit civil obligations*; 1 *Responsabilité délictuelle* n° 456, at 225 (2d ed. 1986). Thus, the owner of a vehicle (i.e., the insured) retains the "guard" even if he allows an employee or family member to drive it. However, it is well established that a thief, or an employee who uses the employer's thing for personal ends, acquires the guard and thus terminates the owner's liability as guardian under article 1384-1°. *Id.* n° 502, at 245.



1384-1°. One of those injured pedestrians, a young girl named Lise Jand'heur, made legal history by becoming the winning party in the most celebrated case in French private law. In *Jand'heur II*, the full Court of Cassation definitely interpreted article 1384-1° to impose on guardians of things a presumption of liability, not just of fault, for all injuries inflicted by things under their guard.<sup>146</sup> The *Jand'heur II* Court recognized that article 1384-1° established a broad domain for something akin to strict liability. As will be seen more fully below, the Court's interpretation gave accident victims a compensation system for injuries inflicted by motor vehicles, which they had not been able to obtain through direct legislative action.<sup>147</sup>

The *Jand'heur* facts were simple but tragic. In April 1925, a delivery truck driven by an employee of a local department store (*Les Galeries Belfortaises*) struck and permanently crippled the young Lise Jand'heur. Her widowed mother sued the department store, as guardian of the delivery truck,<sup>148</sup> under article 1384-1° and, as employer of the deliveryman driving the truck,<sup>149</sup> under article 1384-5°. The initial or lower-level trial court (the *tribunal de Belfort*) found article 1384-1° applicable to the facts and allowed the department store to exonerate itself only by proving that the girl's injuries were attributable to her own fault.<sup>150</sup> Rather than attempt that proof, the department store appealed to the regional Court of Appeals at Besançon, which, trying the case de novo,<sup>151</sup>

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146. Ch. Réunies [Chambres Réunies], 13 Feb. 1930, 1930 D. Jur. I 57 (rapport Marc'hadour) (conclusions Matter) (note Ripert), 1930 S. Jur. I 121 (note P. Esmein). See also H. Capitant, *Les grands arrêts*, supra note 65, at 465. For a translation of the judgment, see Appendix 5 (*Jand'heur II*).

147. Since the early years of the century, there had been various efforts to enact legislation to make it easier for victims of motor vehicle accidents (especially pedestrians) to obtain compensation. The difficulties in proving fault and the resistance of insurance companies to the payment of claims evidently left many injured persons uncompensated. No legislation applicable to motor vehicles ever passed, but in 1924 the French Parliament did enact a special law which imposed strict liability for ground damage inflicted by aircraft. On the proposed legislation, see notes by Ripert in 1925 S. Jur. I 5 and by P. Esmein in 1924 S. Jur. I 321. See also 2 *Traité théorique*, supra note 75, n° 1263, at 365.

148. The courts have generally found that the employer retains the guard of any tools or equipment utilized by employees for work purposes. See supra note 145.

149. Employers are strictly liable for the wrongs of their employees under article 1384-5°, but the injured party must prove the employee's fault to recover from the employer on that basis.

150. The fault of the victim is an external force that exonerates the guardian if the guardian proves that it was unforeseeable and irresistible. For excerpts from the tribunal's decision, see the report of Judge Marc'hadour, supra note 146, and the subsequent decision by the Lyon Court of Appeals, 7 July 1927, 1927 S. Jur. II 106.

151. The Courts of Appeals function as a second level of trial courts. They do not review decisions by the initial trial courts, but decide de novo all "appeals" before them.

rejected the application of article 1384-1° and allowed the widow Jand'heur to recover only upon proof of the driver's fault, something she was evidently unable to do. According to the Court of Appeals, the presumption of fault in article 1384-1° did not apply to things directed by the hand of man, such as the delivery truck driven by the department store's employee.<sup>152</sup>

The widow Jand'heur petitioned the Court of Cassation to annul the Court of Appeals' judgment for violation of article 1384-1°. The interpretive issue in the case was: What was the "act of a thing" that the guardian was presumptively liable for under article 1384-1°, and how did it differ from the "act of a man" that the actor or his employer-guarantor was liable for only upon proof of the actor's fault under articles 1382 or 1383? The interpretation given the statutory term "act of a thing" was of great practical significance because that interpretation would determine the scope of the "strict" liability imposed by article 1384-1°. In other words, the Court of Cassation had to establish the respective domains of the fault-based liability system under articles 1382 and 1383, which favored defendants, and the new system of strict liability for injuries inflicted by things under article 1384-1°, which favored plaintiffs.

In *Jand'heur I* the Court of Cassation's Civil Chamber annulled the judgment below, thus placing the *Jand'heur* facts within the domain of strict liability.<sup>153</sup> In so doing, the Court followed the conclusions of its Advocate General Langlois. In his written conclusions,<sup>154</sup> Langlois analyzed at great length the Court of Cassation's prior decisions under article 1384-1° and the published notes by leading scholars commenting on those decisions. Surprisingly, Langlois did not address the issue as one of statutory interpretation. He did not invoke any of the theories of interpretation described earlier in this article, nor were his arguments either text-based or policy-oriented, as one would expect if he had believed there were a gap in the law. Rather, he focused on the legal rules which the Court of Cassation had formulated in its prior cases under the guise of interpreting article 1384-1°. For Langlois, the task of the Court of Cassation in *Jand'heur I* was to formulate a clear rule for determining what cases fell under the fault-based system (articles 1382 and 1383) and what cases fell under the strict liability system

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152. The private reporters do not reproduce the full text of the Court of Appeals' judgment, but the 1927 judgment of the Court of Cassation's Civil Chamber (translated as *Jand'heur I* in Appendix 4) reproduces the substance of its reasoning.

153. Cass. civ., 21 Feb. 1927, 1927 D. Jur. I 97 (note Ripert), 1927 S. Jur. I 137 (note P. Esmein). For a translation of the judgment, see Appendix 4 (*Jand'heur I*).

154. For the full text of the conclusions, see 1927 Gazette du Palais I 407. The Gazette du Palais (Gaz. Pal.) is another private reporting system.

(article 1384-1°). Langlois plainly believed that the Code itself did not give the Court of Cassation much assistance for that difficult and important task.

In recounting the prior decisions under article 1384-1°, Langlois sought to establish two basic points. First, the Court of Appeals' interpretation, which excluded from article 1384-1° things operated by the hand of man, was inconsistent with prior interpretations by the Court of Cassation. In the exploding boiler cases the Court of Cassation had not inquired whether the acts of the workers operating the boiler played any role in the explosion, and in *The Resins of Bordeaux* case it had applied article 1384-1°, even where there was no defect in the injury-producing thing. Thus, one could no longer limit liability for the act of a thing to defective things (e.g., to a motor vehicle whose brakes suddenly failed). It was also untenable to exclude from the act of things, as suggested by a leading commentator,<sup>155</sup> things in perfect obedience to their operators, because that description did not conform to the facts of the real world. The operator of a thing like a motor vehicle never has complete control over it. Common sense tells us that motor vehicles do not always stop or turn on command, or at least not as rapidly or precisely as the driver might wish.

Second, Langlois argued that the only appropriate basis for limiting the application of article 1384-1° was the dangerousness of the thing subject to the guard. That article applied to dangerous things such as automobiles which had their own internal dynamic over which the guardian could lose control. For injuries inflicted by nondangerous things, the victim had to prove some human actor's fault in order to recover. Here, Langlois was seeking to defuse the department store's argument that applying article 1384-1° to things operated by man would allow the exception to swallow the rule. According to the department store, even a kick in the pants would fall within article 1384-1° if the defendant were wearing shoes.

The Court of Cassation plainly welcomed the suggestion of its advocate general for limiting the scope of article 1384-1°, because the recommended limitation appeared in the Court's opinion in *Jand'heur I* annulling the Court of Appeals' judgment. The Court of Cassation spoke through its Civil Chamber as it normally does in tort cases. The judgment itself contained, in the typical, concise French style, three whereas clauses and a disposition clause. In the first whereas clause, the Court recited its now familiar formula on the presumption of fault imposed on the guardian by article 1384-1°. The Court's language closely tracked the language used in *The Resins of Bordeaux*. In its second

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155. See the note by Savatier in 1925 D. Jur. II 41.

whereas clause the Court merely reported the facts as found by the lower courts. The Court then opened its third whereas clause with the ominous "But whereas," a sure sign that annulment would follow. After rejecting the Court of Appeals' distinction between things operated or not by the hand of man, the Court formulated as the correct rule: "it suffices [for the application of article 1384-1°] that it is a thing subject to the necessity of a 'guard' by reason of the dangers to which it may expose others." Because the Court of Appeals had invoked, in support of its refusal to apply article 1384-1°, a reason that had no basis in the text as interpreted by the Court of Cassation, that Court annulled the lower court's judgment in the disposition clause of the judgment.

The Court of Cassation did not rule whether a delivery truck was a dangerous thing necessitating a guard under article 1384-1° because that question was a factual one for the trial courts. The Civil Chamber therefore remanded *Jand'heur* to another Court of Appeals for a decision on the merits. As *Jand'heur I* demonstrates, the Court of Cassation itself only interprets the law; it neither finds the facts nor reviews the lower court's findings of fact for evidentiary sufficiency.<sup>156</sup>

The Court of Cassation's Civil Chamber plainly rendered in *Jand'heur I* what it considered to be a judgment of principle and not just a decision in a particular case. In other words, it formulated a rule far broader than required by the facts of the case. Indeed, the Court formulated a standard for determining the respective domains of fault-based and strict liability. The Court plainly sought to provide a definitive resolution to a controversy that had raged for a number of years. The Civil Chamber had previously applied the system of strict liability for the act of things to a motor vehicle operated by a driver in a 1924 decision,<sup>157</sup> discussed at length by Advocate General Langlois, but that judgment was not so clearly or broadly reasoned as *Jand'heur I*. Some lower courts had adopted that interpretation, but others had refused to do so and had required pedestrians struck by cars to prove fault under articles 1382 or 1383 in order to recover.

The situation in the lower courts in the mid 1920s was, according to one commentator, one of anarchy.<sup>158</sup> The Court of Cassation's new

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156. Professor Ripert did argue that the Court of Cassation could exercise greater control over the trial courts by defining more precisely what it meant by "danger." See Ripert's note to *Jand'heur I*, supra note 153. Such an approach resembles the phenomenon described in the infra text accompanying notes 167-72, whereby the interpretive efforts of subsequent courts focus on the text of the Court of Cassation's formula rather than on the statutory text. Here the word subject to interpretation ("danger") does not even appear in article 1384-1°.

157. Cass. civ., 29 July 1924, D. Jur. I 5 (note Ripert), 1924 S. Jur. I 321 (note P. Esmein).

158. See the note by Ripert to *Jand'heur I* cited in supra note 153.

interpretation of article 1384-1° had not yet become settled. Trial court judges had difficulty accepting the major shift from a fault-based system to a system of strict liability in motor vehicle accident cases, which surely comprised a substantial portion of their case load. Resistance by lower court judges to Court of Cassation decisions is an accepted feature of the French legal scene because a particular decision, or even a string of decisions, are not precedents which bind the lower courts. But the commentators on *Jand'heur I* wondered whether the Court of Cassation had now spoken so forcefully that the lower courts would find it prudent to fall in line with the Court's newer, broader interpretation of article 1384-1°.<sup>159</sup>

The lower courts, however, resisted the new interpretation. The Court of Cassation, after annulling the judgment of the Court of Appeals of Besancon, remanded *Jand'heur* to the Court of Appeals of Lyon for a decision on the merits. Strictly speaking, the Court of Cassation does not "decide" a case, but merely determines whether the lower court's judgment has violated the law. If it has, the Court annuls the judgment and remands the case to another Court of Appeals for a new decision. The Court of Appeals on remand repeats what the first Court of Appeals did and retries the case to determine whether to confirm or modify the judgment of the lower-level trial court that initially decided the case. Of course, in annulling the first Court of Appeals' judgment, the Court of Cassation usually interprets the relevant Code provisions, but that interpretation does not bind the first remand court as it would under the "law of the case" doctrine in the common-law world. In *Jand'heur* on remand, the Court of Appeals of Lyon refused to apply article 1384-1° to the facts of the case for precisely the same reason that the earlier Court of Appeals had refused to do so. According to the court, the "act of a thing" under that article did not include the act of things operated by the hand of man.<sup>160</sup>

To one trained in the common law, the judgment of the Court of Appeals is an amazing document. It makes no mention whatsoever of the Court of Cassation's judgment, in the same litigation, that had just rejected the interpretation of article 1384-1° that the Court of Appeals now adopts. At the same time, it castigates the original trial court for interpreting article 1384-1° in the same way the Court of Cassation had just interpreted it. But the Court of Appeals judges knew they were resisting, as was their right, an interpretation which the Court of Cas-

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159. See the notes on *Jand'heur I* by Professors Ripert and Esmein cited in *supra* note 153.

160. Lyon, 7 July 1927, 1927 S. Jur. II 406. The Court of Appeals judgment was unusually prolix. In more than two dozen whereas clauses, it recited all conceivable arguments against the application of article 1384-1° to the facts of the case.

sation considered settled and that their principled resistance would surely prompt a decision on the issue by the full Court.

That decision came three years later when the full Court, all chambers united, solemnly reaffirmed in *Jand'heur II*<sup>161</sup> the decision of the Civil Chamber in *Jand'heur I*. Once again the Court followed the conclusions of its advocate general, but its new Advocate General Matter delivered a more passionate and less cautious plea for the application of article 1384-1° than had his predecessor Langlois. The judgment itself, although closely paralleling in style and language the text of the judgment in *Jand'heur I*, contained a number of changes which reflected that bolder approach.

First, the opening whereas clause, which restated the prevailing interpretation of article 1384-1°, substituted the term "presumption of liability" for "presumption of fault" and eliminated language limiting that presumption to the guardians of moveable property. The first change emphasized that article 1384-1° did more than just shift the burden of proof on the issue of fault, while the latter change demonstrated the article's comprehensive coverage of all inanimate things. More importantly, in the "but whereas" clause immediately preceding the annulment, the Court deleted any reference to the dangerousness of the thing. After rejecting the Court of Appeals' distinction between things operated or not by the hand of man, the Court concluded: "[I]t is not necessary that the thing have an inherent defect susceptible of causing the injury, as article 1384 attaches liability to the guard of the thing, not to the thing itself."

Before analyzing how the Court in *Jand'heur II* reached its interpretation of article 1384-1°, the legal effect of that interpretation deserves some mention. The *Jand'heur II* formula reads as follows:

Whereas the presumption of liability established by that article [article 1384-1°] against one who has under his guard an inanimate thing which has caused injury to another may be rebutted only by proof of an unforeseeable event [*cas fortuit*] or of an irresistible force [*force majeure*] or of an external cause not imputable to the guardian; and it does not suffice to prove that he committed no fault or that the cause of the damage remains unknown.

The Court of Cassation has repeated that formula verbatim in thousands of cases, where it serves as the major premise of a syllogism supporting the application of article 1384 to the facts of the case. That language,

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161. See citations in *supra* note 146. For a translation of the judgment, see Appendix 5.

of course, does not appear in the text of article 1384-1°, which speaks only of a person's liability for the act "of things that he has under his guard."

It is doubtful whether any of the many legislative bodies that have sat in France since 1804 would have voted to insert such language into the text of article 1384-1°. Even though such an amendment might have attracted widespread popular support on account of its generosity to accident victims, the propertied interests and, more recently, the insurance industry surely could have blocked its enactment.<sup>162</sup> Ironically, the judge serving on the Court of Cassation whom the academic writers credit with the authorship of the *Jand'heur* formula (Ambroise Colin) had previously drafted, when he was a law professor, a bill rejected by the Parliament to establish a special regime outside the Code to compensate, without proof of fault, the victims of motor vehicle accidents.<sup>163</sup>

The *Jand'heur II* formula, however, has acquired the same legal force as any rule expressly stated in the Code. Indeed, it is the classic example given in support of Professor Dupeyroux's thesis<sup>164</sup> that courts have arrogated for themselves the power to formulate case-law rules having the same legal effect as statutory rules. The legislature could, of course, modify the *Jand'heur II* rule prospectively, but the legislature can do that for any rule contained in the Code. Until that occurs, litigants and judges in future cases must recognize that *Jand'heur II* states a binding legal rule which, in Professor Boulanger's phrase, has become attached to the statutory text.<sup>165</sup>

*Jand'heur II* thus provides the most prominent example of case law that is binding law in France. The *Jand'heur II* rule became law not so much through acceptance by the lower courts, even though that did come later, as through the full Court of Cassation imposing its sovereign will on recalcitrant lower court judges. Today it would be unthinkable for any court to interpret article 1384-1° in a way contrary to the *Jand'heur II* interpretation; and any liberty the French system gives judges to interpret that article according to their own lights would only

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162. See, Savatier, *Le gouvernement des juges en matière de responsabilité civile*, in 1 *Etudes Lambert*, supra note 125, at 453.

163. 2 *Traité théorique*, supra note 75, n° 1263, at 365. Colin was the *rapporteur* in *Jand'heur I*. Both *Jand'heur* opinions, like all French judicial opinions, were anonymous, but Colin's formative role seems to be recognized unofficially.

164. See, O. Dupeyroux, "La jurisprudence, source abusive de droit," in 2 *Mélanges offerts à Jacques Maury* 349 (1960).

165. See, Boulanger, *Notations sur le pouvoir createur de la jurisprudence civile*, 1958 *Rev. tri. dr. civ.* 417.

be, as phrased by Professor Maury, the liberty to err ("mal faire").<sup>166</sup>

Perhaps the strongest evidence that the *Jand'heur II* formula states a binding legal rule lies not in the lower courts' faithful application of it, but in the exigetical efforts it has inspired. The elaborate system of subrules developed in subsequent decisions under article 1384-1° are more interpretations of *Jand'heur II* than they are of the Code text. That phenomenon occurred in *Jand'heur II* itself because the subrule formulated in the third whereas clause, attaching responsibility to the guardian of the thing regardless of whether a human hand activated it, appears to be an interpretation, not of any statutory text, but of the legal rule stated in the opening whereas clause.

The Court of Cassation has continued to interpret its *Jand'heur II* formula by defining *cas fortuit* and *force majeure* and by ruling that the presumption of liability applies against the guardian of a thing that injures another thing. In collision cases, therefore, all persons suffering property damage may invoke article 1384-1° against each other to recover their respective losses.<sup>167</sup> The Court has also interpreted the word "cause" in the *Jand'heur II* formula (the inanimate thing must have "caused injury to another") to require that the thing "intervene" in the realization of the injury and not just play a "passive" role.<sup>168</sup> The presumption of liability does not apply against the guardian of a lawfully parked vehicle struck by some person or thing, for example, or even against the driver of a vehicle properly proceeding on the public highway.<sup>169</sup>

As one can imagine, the "passivity" of the thing has become the guardian's principal grounds for exoneration, and proof of passivity bears a close resemblance to proof of due care in using the thing in a normal manner. Indeed, French commentators who saw in *Jand'heur II* the Court of Cassation's adoption of the risk theory,<sup>170</sup> or at least a tendency in that direction,<sup>171</sup> saw in the Court's subsequent interpretation of the causation requirement a substantial retreat to fault-based liability.<sup>172</sup>

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166. J. Maury, "Observations sur la jurisprudence en tant que source de droit," in 1 Etudes Ripert, supra note 45, at 28, 47. For a similar analysis of the *Jand'heur II* rule, see Jestaz, La jurisprudence: Reflexions sur un malentendu, 1986 D.S. Chr. 9.

167. Cass. civ., 20 Mar. 1933, 1933 D. Jur. I 57 (note Savatier), 1933 S. Jur. I 257 (note Mazeaud). See also A. Weill and F. Terré, Droit civil: Les obligations n° 748, at 843 (3d ed. 1980).

168. Cass. civ., 27 Jan. 1945, 1945 D. Jur. I 317 (note Savatier). See also H. Capitant, Les grands arrêts de la jurisprudence civile n° 140, at 492 (8th ed. 1984).

169. Id.

170. Josserand, La responsabilité du fait des automobiles devant les chambres réunies de la Cour de cassation, 1930 D.H. Chr. 25.

171. Capitant, La responsabilité du fait des choses inanimées d'après l'arrêt des Chambres réunies du 13 fév. 1930, 1930 D. H. Chr. 29.

172. 2 Traité théorique, supra note 75, n° 1152, at 207-08.



The discussion so far has assumed that the Court of Cassation's decision in *Jand'heur II* did involve creative lawmaking in the sense that the Court added something to the statutory text. Putting the two texts (the judgment's first whereas clause and article 1384-1°) side by side confirms that assumption: the words are different, and the *Jand'heur II* formula is the legal rule that any plaintiff's lawyer would choose. The full Court of Cassation surely realized that the *Jand'heur II* formula added something to the statutory text, but one might wonder whether, to reiterate Professor Maury's concern, "all voices" were heard before the Court announced what was in effect a binding legal rule.<sup>173</sup> In *Jand'heur II*, the arguments before the full Court of Cassation did address how the Court should go about interpreting the Code, but gave the Court surprisingly little assistance on how it should make law.

The full Court of Cassation had before it in *Jand'heur II* two detailed analyses of the issues raised by the case: the report of one of its members, the *rapporteur* Marc'hadour,<sup>174</sup> and the conclusions of its Advocate General Matter.<sup>175</sup> Both retold the familiar story of article 1384-1°'s inauspicious beginning, for no one seemed to notice it in 1804, and its discovery by the courts beginning with the *Teffaine* case in 1896. Marc'hadour, as is customary with the *rapporteur*, did not explicitly recommend any particular solution, but Matter feverently concluded in favor of annulment and for a broad interpretation of the guardian's liability under article 1384-1°. Both acknowledged that the issue before the full Court of Cassation was not just the correctness of the distinction between things operated or not by the hand of man, but the legitimacy of the Court's utilizing article 1384-1° as the basis for a new system of strict tort liability paralleling, if not largely superseding, the fault system found in articles 1382 and 1383. How Marc'hadour and Matter approached that issue tells us a lot about how French jurists approach statutory interpretation.

The absence of any recommendation in Marc'hadour's report is deceptive, because its thrust plainly favors the plaintiff. His approach to the interpretation of article 1384-1° was to ignore its legislative history and to emphasize the generality of its wording. His principal concerns were to give effect to those words and not to read into the text distinctions that were not there. The text imposed liability on the guardian for the act "of things that he has under his guard" and did not

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173. J. Maury, *Observations sur la jurisprudence en tant que source de droit*, in *Etudes* Ripert, *supra* note 45, at 28.

174. Reproduced with *Jand'heur II* in the Dalloz reporter cited in *supra* note 146. Marc'hadour's report is also reprinted (in French) in F. Lawson, *Tortious Liability for Unintentional Harm in the Common Law and the Civil Law* 252-71 (1982).

175. Reproduced with *Jand'heur II* in the Dalloz reporter, *supra* note 146.

distinguish between dangerous and nondangerous things or between things operated or not by the hand of man. The only textual basis for imposing or limiting liability was the notion of the "guard," which Marc'hadour defined in terms of the guardian's control over the thing.

Marc'hadour responded similarly to the defendant's argument that article 1384-1° was only a transitional paragraph and not an independent basis for imposing liability. Such an interpretation, according to Marc'hadour, deprived article 1384-1° of any meaning. He then sympathetically portrayed the *Teffaine* decision both as giving meaning to those general words and responding to contemporary social needs. For Marc'hadour, given the *Teffaine* interpretation of article 1384-1°, its application to *Jand'heur* logically followed. Not only was there no textual basis for limiting article 1384-1° to defective things or to things not operated by the hands of their guardian, but the justification for imposing a presumption of liability on the guardian was greater when the guardian was operating the injury-causing thing than when the thing had some hidden manufacturing defect that the guardian could not reasonably discover. As to the scope of that presumption, Marc'hadour presented the *Montagnier* interpretation of "liability" as settled law. Thus, two themes dominated his report: the Court should give general words in the Code their plain meaning and should follow accepted past interpretations of the Code.

Matter's argument for a broad interpretation of liability under article 1384-1°, by contrast, invoked all the recognized theories of interpretation, which makes it more interesting. He invoked the grammatical approach to establish the generality of the word "things," quoting dictionaries and citing the use of the same word in other Code articles. He used logical arguments to resist the application of reasoning *a contrario* to limit the special liability for things to those things specially enumerated in article 1385 (animals) and article 1386 (collapsing buildings). According to Matter, the Code's drafters had the unfortunate habit, which he demonstrated by citing other articles, of stating a general principle and then providing a list of specific cases that served as examples but that did not limit the scope of the principle. Matter also made an historical argument from the rather skimpy, but generally unfavorable, legislative history. He cited the standard examples of liability for things in Roman law and in the customary law of pre-Revolutionary France (liability for animals, for the collapse of a building, and for falling objects) and boldly suggested that perhaps the drafters had wished to generalize that liability in the pithy phrases of article 1384-1°.

Matter must have realized the inadequacy of these traditional interpretive arguments, because he closed his conclusions by eloquently invoking the evolutive or teleological method of interpretation. He did so in response to the defendant's argument that the judgment of the

Civil Chamber in *Jand'heur I* was innovative, broke with tradition, and sought to reform the system for compensating victims of motor vehicle accidents. This reform, argued the defendant, required legislative action, and the French Parliament, unlike the legislatures in other countries, had so far refused to adopt it. Matter responded that in the French system, case law played a creative role and could accomplish that reform by adapting the Code's 1804 text "to the realities and demands of modern life."<sup>176</sup>

Matter thus paraphrased, although without any specific acknowledgement, the famous speech advocating judicial updating of the Code given by the Court of Cassation's first president, Ballot-Beaupré, on the occasion of the Code's centenary.<sup>177</sup> Matter explicitly recognized that the evolutive interpretation of statutory texts, which he advocated, was proper only when the language was general enough to permit it. The courts could not distort or ignore the plain meaning of words. Fortunately, however, article 1384-1° dated from a time when "one knew how to draft a statutory text."<sup>178</sup> The Code's drafters, there and elsewhere, had chosen expressions "so supple and so precise at the same time, so wide and comprehensive that, formulated at the time of the stage coach, they are just as fitting for the automobile or even the airplane."<sup>179</sup>

Matter's argument is unusual because of its frank invocation of the teleological approach. French jurists seem happier with arguments more closely connected to texts. What is surprising to the American observer is the absence of any fact-based policy arguments for the evolutive interpretation Matter presented to the court. Nowhere in his conclusions did he identify those "realities and demands of modern life" that justified departing from the former liability rules and imposing strict liability on guardians operating things such as motor vehicles. Perhaps he thought the changes France had undergone since 1804 were self-evident. Certainly the facts of the reported cases disclosed the potential for personal injuries attributable to motor vehicles, and most of these cases involved pedestrians struck by moving vehicles. That fact pattern presented the strongest case for the application of the theory of risk: should not the driver who profited from the use of a motor vehicle pay the full cost of that usage? But Matter mentioned the tragic facts of the *Jand'heur* case only once, and then simply in an introductory paragraph where he did no more than report the judgment of the initial trial court. Matter did not invoke the theory of risk or document the

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176. 1930 D. Jur. I 57, at 70.

177. See *supra* note 49.

178. 1930 D. Jur. I 57, at 70.

179. *Id.*

plight of pedestrians or of any other class of accident victims. Moreover, Matter proposed, and the Court adopted, a general rule not limited to motor vehicles that struck pedestrians, but applicable to all injuries caused by things.

None of the contemporary commentators questioned the justness of holding the department store in the *Jand'heur* case strictly liable for the crippling of a little girl by its delivery truck. The store surely carried insurance in the course of its business to cover such mishaps. But the scope of the Court's ruling caused considerable alarm. Did the Court really understand the consequences of what it was doing? Professor Ripert, the Court's most acerbic critic, questioned the rule's impact on property owners in situations where insurance was not customary. He added that even the civil code of socialist Russia only imposed liability for "activities which caused an aggravation of danger for the surroundings."<sup>180</sup>

The absence of fact-based policy arguments, so apparent in Matter's conclusions, is also prevalent in the contemporary academic commentary on both *Jand'heur I* and *Jand'heur II*. This situation is surprising given the recent publication of Gény's magisterial study on how courts should make law.<sup>181</sup> His approach, like that of the American Legal Realists, emphasized facts.<sup>182</sup> Facts, not just those of particular cases but of life in general, give courts the data for the construction of legal rules. Gény's work, still widely admired in jurisprudential circles, appeared to have had no direct influence on the remarkable lawmaking enterprise of the French courts that culminated in *Jand'heur II*. None of the participants, so far as is discernible from today's vantage point, cited his works or invoked his fact-based method.

The explanation for this lack of interest in Gény's method may be that the practicing jurists engaged in the lawmaking proces, the advocates, the judges, and the professors who published notes on particular decisions, did not feel comfortable explicitly acknowledging an inadequacy, if not a gap, in the Code that the courts must redress and that practitioners must play a part in redressing. As bold an advocate as Matter invoked the evolutive approach mainly for its rhetorical effect, not as a source of law. His principal argument was one based on authority. In responding to the department store's argument that the widow Jand'heur was asking the Court to legislate, Matter reported, before invoking the well-known phrase of Ballot-Beaupré, that the Court

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180. See note by Ripert to *Jand'heur II* cited in *supra* note 146.

181. F. Gény, *Science et technique en droit privé positif* (4 vols. 1914-24).

182. Herget and Wallace, *The German Free Law Movement as the Source of American Legal Realism*, 73 U. Va. L. Rev. 399, 409-11 (1987) (discussing Gény).

of Cassation had applied article 1384-1° to inanimate things in at least twenty-five judgments since 1896. In his peroration, he asked the Court to maintain that case law because the case law was just and responded to contemporary needs.<sup>183</sup> Matter in effect argued that, to the extent there was a gap in the Code, the courts had already filled it, and the solution they had provided was working pretty well.

Matter's approach minimizes the significance of what the Court of Cassation did in *Jand'heur II*. He sought to portray judicial lawmaking in terms familiar to the common-law practitioner. He saw it more as an incremental process than something a court must do on a given day or in a particular case. When French courts do make new law in a particular case, as the Court of Cassation certainly did in *Teffaine*, they tend not to explain very well what they are doing, perhaps because they do not know how to justify such creativity. Matter did not address the correctness of *Teffaine's* discovery of article 1384-1°, but treated that discovery as something that had gained acceptance over time.

Whether Géný himself could have argued more convincingly than Matter in favor of the *Jand'heur II* result is unknown, because Géný did not write much on the guardian's liability for the act of things. There is little doubt, however, that he would have found Matter's arguments unsatisfactory. Géný did not find logical arguments particularly helpful in resolving issues of statutory construction. Whether a court should extend a particular provision to cover analogous cases or limit it to its literal terms (reasoning *a contrario*) depended on the legislature's intent in enacting the particular provision.<sup>184</sup> Thus, one would have to determine the legislator's intent in enacting special provisions on liability for animals and for the collapse of buildings in order to decide whether to limit those provisions to their terms or to treat them, as had Matter, as examples of a more general category. Géný believed that the courts, in choosing between arguments *a contrario* and by analogy, often did what they believed just and equitable under the guise of implementing some fictional legislative intent.<sup>185</sup>

Géný also would have found troublesome Matter's invention of legislative intent to suit his purposes. Géný emphasized that the interpreter always should approach the interpretive task without any pre-conceived result in mind and should respect the legislator's intent where an intent may be discerned.<sup>186</sup> With respect to the legislator's intent in enacting articles 1382 to 1386, Géný recognized that the lawmaker of

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183. 1930 D. Jur. I 57, at 70.

184. 1 Géný, *Méthode*, supra note 16, at 33-36.

185. 1 id. n° 21, at 43.

186. 1 id. n° 98, at 265.

1804 intended to establish a fault-based system, and that the system of liability based on the theory of risk developed in the 1890s by his colleagues, Professors Saleilles and Josserand, had no basis in the Code.<sup>187</sup> Géný, nevertheless, expressed warm approval of the risk theory and of "its praiseworthy desire to obtain just compensation for accident victims."<sup>188</sup> He suggested that the courts could achieve the happy results promised by the risk theory not under the guise of statutory interpretation but through free scientific research, that is, through overt judicial law-making.<sup>189</sup>

Of course, free scientific research was permissible, under Géný's method, only if there were a gap in the Code. Remarkably, Géný suggested that there was a gap because the drafters had no intent at all on the imposition of liability based on the objective creation of a risk.<sup>190</sup> Evidently, they had no intent on the matter because the idea had never occurred to them. Or, as Géný expressed it even more boldly in a subsequent law review article, their recognition of a fault-based system did not preclude the judges from imposing liability on the basis of risk creation where they believed such liability appropriate.<sup>191</sup> Nowhere did Géný address the widely accepted view that the legislator of 1804 intended fault to be the sole basis of liability. His supposedly open-minded search for the intent of the framers, therefore, seems strangely limited. In order to preserve a suitable domain for free scientific research, and for the risk theory of his friend and preface-writer Saleilles, Géný rather precipitately found a gap which the courts could fill through explicit lawmaking. Some may find this approach more forthright than that of those who wish to mute judicial creativity by favoring a more evolutionary process,<sup>192</sup> but the latter approach may reflect better how French courts make law over time by obtaining the acceptance of all concerned.

#### *D. Flying Tiles: the Bardinet and Sons Case*

The Court of Cassation's discovery of article 1384-1° in *Teffaine*, reaffirmed by the full Court in *Jand'heur II*, had a profound effect on French tort law. Prior to *Jand'heur*, the primary basis for tort liability

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187. 2 id. n° 174, at 174.

188. Id.

189. 2 id. n° 174, at 175-77 and 1 id. n° 98, at 267 (rejecting evolutive approach and invoking "other, more supple" means for updating the Code, i.e., free scientific research).

190. 2 id. n° 174, at 175.

191. Géný, *Risques et responsabilité*, 1902 *Rev. tri. dr. civ.* 812, 846.

192. Géný so argued in a supplementary section he added in the second or 1919 edition of his work. 2 F. Géný, *Méthode*, supra note 16, n° 190, at 248-51.

was fault. The injured party had to prove the defendant's fault under articles 1382 or 1383 in order to recover except in two situations where the Code specifically came to the aid of the victim. The Code's drafters, after stating the general fault principle in articles 1382 and 1383, specifically imposed liability for injuries inflicted by an animal (article 1385) or by the collapse of a building (article 1386). By enumerating these special cases of liability, recognized by Roman law and by the customary law of pre-Revolutionary France, the drafters plainly intended to favor the victim by derogating in some fashion from the fault principle, or at least from the requirement that the injured party prove fault to recover. By the end of the nineteenth century, the courts had interpreted the owner's liability under those articles not only to relieve the injured party from the burden of proving fault, but also to require the owner to prove some unforeseeable and irresistible force in order to escape liability.<sup>193</sup>

The *Jand'heur II* decision extended to a much larger group of accident victims the special advantages previously reserved to those injured by an animal or by the collapse of a building. Now persons injured by any inanimate thing could invoke an even more generous presumption of liability against the guardian of the thing. Persons injured by animals or by falling buildings no longer enjoyed a privileged position. Ironically, they now enjoyed a less favored position to the extent that the special statutory texts contained limitations on the owner's liability not found in the sparser text of article 1384-1°.

There are no such limitations in article 1385, which is in fact more generous to the injured party than is article 1384-1° because it holds the owner responsible even if the animal has wandered away or escaped and is thus no longer under the owner's guard. Article 1386, on the other hand, does contain a significant limitation on the owner's responsibility. The owner is "liable" for an injury caused by the collapse of a building only if the collapse "has occurred as a consequence of a failure to keep it [the building] in repair or of a defect in its construction." This language in effect introduces a fault component to the owner's liability under article 1386. To invoke against a building's owner the presumption of liability found in article 1386, a person injured by the building's collapse must first establish all the material elements required by that article, including the lack of maintenance or a defect in construction that caused the building's collapse. The injured party suing under article 1386, therefore, is in a less favorable position than

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193. Such, of course, was the *Montagnier* interpretation of the owner's liability under article 1385 for injuries inflicted by an animal. For a similar interpretation of the owner's liability under article 1386 for injuries inflicted by the collapse of a building, see Cass. civ., 19 Apr. 1887, 1888 D. Jur. I 27, 1887 S. Jur. I 217.

is the injured party suing under article 1384-1°, who need only show that the act of a thing caused the injury and need not show any lack of maintenance or defect in the thing.

Although neither article 1386 nor its interpretation by the courts has changed, the legal landscape around it has changed. The Court of Cassation's construction of a magnificent edifice of presumed liability on the "little rag" of article 1384-1° has transformed article 1386 from an article that favored accident victims by derogating from the general fault principle to an article that is less favorable to victims than the new general principle of strict liability. Article 1386 has become, in the opinion of most commentators, a legal anachronism deserving a prompt repeal.<sup>194</sup> Parliament has not responded to that appeal, perhaps because apartment owners have enough political power to block any legislation depriving them of the special protection article 1386 now gives them.<sup>195</sup>

The Court of Cassation has also refused to eliminate, under the guise of interpretation, the limitations article 1386 imposes on what the Court has accomplished under article 1384-1°. In other words, the Court has respected the now outdated statutory text despite the inequities it produces. The line of cases from *Teffaine* to *Jand'heur II* demonstrates that the Court of Cassation has the capacity to adapt generally worded Code provisions to the needs and realities of modern life. The recent history of article 1386 proves that the Court does not have the same freedom to modernize an outdated text through interpretation where the legislature has specified in some detail the prerequisites for the text's application.

A well-known 1942 case, *Bardinet and Sons*,<sup>196</sup> demonstrates the Court of Cassation's respect for the text of article 1386 despite the fact that its provisions now serve the advantage of the building's owner rather than, as originally intended, that of the injured party. In that case, a heavy wind dislodged some tiles from the roof of a building owned by the family business Bardinet and Sons. The flying debris damaged the property of an adjoining landowner who brought suit against Bardinet and Sons under articles 1384-1° and 1386. The Court of Appeals (the second-level trial court) refused to apply article 1386 because it found that the building was in proper repair and there was no defect in its construction. Thus, the owner of the building was not

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194. A. Weill and F. Terré, *Droit civil: Les obligations* n° 713 and 714, at 782-83 (3d ed. 1980).

195. 4 J. Carbonnier, *Droit civil: Les obligations* n° 106, at 487 (10th ed. 1978).

196. Cass. civ., 4 Aug. 1942, 1943 D. Jur. I 1 (note Ripert), 1943 S. Jur. I 89 (note Houin). The full designation of the parties is *Société "Les Fils de Bardinet" v. Société Ferré et Duffourg*. For the text of the judgment, see also H. Capitant, *Les grands arrêts de la jurisprudence civile* n° 132, at 462 (8th ed. 1984).



liable under article 1386 for the injury caused by the tiles. Although the plaintiff had no trouble establishing the building's collapse, for any partial or total displacement of the materials comprising the building constitutes a "collapse,"<sup>197</sup> he had not established that some lack of maintenance or defect in construction had caused that collapse.

The Court of Appeals nevertheless found Bardinet and Sons liable by applying article 1384-1° against the company as the guardian of the injury-producing building. As is often the case, Bardinet and Sons was not only the owner of the building, but also its guardian in the sense of enjoying or exercising control over it. The company had sought to exonerate itself under article 1384-1° by proving *force majeure*, but the Court of Appeals found that the wind that dislodged the tiles was not sufficiently violent to have the character of *force majeure*. The Court's judgment thus reflected the new relationship between articles 1386 and 1384-1°. It found liability under article 1384-1° when there was no liability under article 1386, the article that traditionally was more favorable to the injured party.

The Court of Cassation annulled that judgment for violation of article 1386. According to the Court, article 1386 specially recognized the owner's liability for the collapse of a building "under conditions which derogated from article 1384-1°."<sup>198</sup> In the absence of these conditions, the owner "could incur no liability for the collapse of the building."<sup>199</sup> The Court of Appeals had found that the building's collapse had caused the plaintiff's injury. Therefore, that Court had violated article 1386 when it applied the general provisions of article 1384-1° to the facts of the case after it had properly nonsuited the plaintiff under article 1386.

The Court of Cassation's reasoning provides a good example of logical interpretation. As one commentator expressed it, the special provision (article 1386) controlled the general (article 1384-1°) according to the words of the maxim *specialia generalibus derogant*.<sup>200</sup> Ironically, the Court had rejected the application of that very maxim in *Jand'heur II* when it recognized article 1384-1° to be a general provision applicable to all inanimate things and not just to the things enumerated in the special provisions that followed on animals and collapsing buildings.

The Court's scholastic reasoning did not win much favor with the commentators, who taxed the Court with inconsistency in determining when a special provision controls and for invoking exigetical reasoning

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197. 2 *Traité théorique*, supra note 75, n° 1042, at 31-32.

198. 1943 D. Jur. I 1, at 1, 1943 S. Jur. I 89, at 90.

199. *Id.*

200. See note by Houin to *Bardinet and Sons* cited in supra note 196.

when it was not appropriate.<sup>201</sup> For a specific provision to control, Professor Ripert argued, the same lawmaker must have formulated both the general rule and the exception.<sup>202</sup> That was not the case here. While the Code's drafters plainly formulated the special rule found in article 1386, they did not formulate the general rule now found in article 1384-1°. The courts formulated that general rule much later, not on exigetical grounds, but to favor accident victims who, in the age of machines, needed more protection than the Code's drafters had given them in 1804. The illogic of denying that additional protection to the injured party in *Bardinet & Sons* also did not escape criticism.<sup>203</sup> Why should the victim struck by flying debris from a building be worse off than the victim struck by flying debris from a car, machine, or other moveable property?

Despite this criticism, one can understand the Court of Cassation's reluctance to allow a rule of its own creation to supersede a clear statutory rule limiting the owner's liability for the collapse of a building to cases where the building was improperly maintained or constructed. Injured persons would always invoke the more favorable rule attached to article 1384-1°, and article 1386 would have no further role to play.<sup>204</sup> Initially, the Court of Cassation had taken the still more extreme position that article 1384-1° did not apply at all to immoveables (what common lawyers term "real property"), but only to moveable things. It reaffirmed that position as recently as 1924, albeit in a case that involved real property that caught fire.<sup>205</sup> The Parliament had just passed the special statute which excluded from article 1384-1° injuries caused by property that caught fire; and the Court was no doubt hesitant to apply article 1384-1° to an identical fact situation that arose before the Act's promulgation. The legislature had just warned the Court to tread carefully in that area.<sup>206</sup>

Limiting article 1384-1° to moveable things, however, produced too many illogical results; and in 1928 another chamber of the Court of

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201. See especially the note by Ripert to *Bardinet and Sons* cited in supra note 196. For other critical commentary, see the note by Dejean de la Batie to Cass. civ., 12 July 1966, 1967 J.C.P. 15185, and 2 G. Marty and P. Raynaud, 2 Droit civil: Les obligations n° 457, at 488 (1962).

202. See the note by Ripert to *Bardinet and Sons* cited in note supra 196.

203. In addition to the notes by Ripert cited in supra note 196, and by Dejean de la Batie cited in supra note 201, see Becqué, Coexistence ou incompatibilité des présomptions en matière de responsabilité civile, 1952 Rev. tri. dr. civ. 309, 321-22.

204. Dejean de la Batie, himself very critical of the *Bardinet and Sons* interpretation of article 1386, acknowledges that many scholars accept it because of its fidelity to the text of article 1386. See his note cited in supra note 201.

205. Cass. civ., 26 June 1924, 1924 D. Jur. I 159, 1925 S. Jur. I 65 (note Morel).

206. 2 Traité théorique, supra note 75, n° 1208, at 288.

Cassation applied article 1384-1° to an injury inflicted by an elevator, an immovable by destination under French law (a "fixture" at common law).<sup>207</sup> To apply the presumption of liability against the guardian of a moveable automobile, but not against the guardian of an immovable elevator, was indefensible as a matter of logic and not necessary to preserve the intended role of article 1386, because a malfunctioning elevator that injures does not involve, at least normally, the collapse of a building. In *Jand'heur II*, the full Court of Cassation likewise interpreted the word "things" in article 1384-1° to include immovable things by deleting from its new presumption-of-liability formula the limitation to moveable things found in the *Jand'heur I* version.<sup>208</sup>

In *Bardinet and Sons* the Court of Cassation could have gone one step further in eliminating the illogical results attributable to the survival of article 1386 by allowing the victim injured by a building's collapse to recover from the owner of the building under article 1384-1° whenever the owner was also the guardian of the building. That route was open to the Court, even under the exigetical approach, because it would have left some role for the special provisions in article 1386.<sup>209</sup> That article would still apply if the owner were not the guardian of the building at the time of the accident, but had entrusted the guard to someone else, such as a tenant. The maxim *specialia generalibus derogant* does not apply where the special provision covers situations not covered by the general, which is plainly the case under article 1386. While that approach would leave article 1386 a much smaller role than that envisioned by its framers, the newly discovered article 1384-1° now satisfies the framer's concern to help persons injured by collapsing buildings in those cases where the owner is also the guardian of the building.

The framers of article 1386, the argument continues, had only wanted to insure that persons injured by the collapse of a building had someone to look to for redress. That someone was to be the owner, who would be liable not only for his own fault in constructing or maintaining the building, but would also be liable as a guarantor for the fault of others against whom he would have recourse, for example, the fault of the architects or builders who constructed the building or that of the tenants who were living in it. If that were the legislature's intent in enacting article 1386, and its imposition of liability on the owner even if he were not the guardian of the building provides some evidence of such an intent, then the Court of Cassation would not have violated that intent by extending the judicially created liability for the act of things to the

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207. Cass. req., 6 Mar. 1928, 1928 D.P. Jur. I 97 (note Josserand), 1928 S. Jur. I 225 (note Huguency).

208. See the texts of the two decisions in Appendices 4 and 5.

209. See note by Dejean de la Batie cited in *supra* note 201.

guardian of a collapsed building. Article 1386 does no more than establish the conditions for owner's liability as owner, and even in that capacity the courts have held him liable under 1382 for any proven fault that caused the collapse of a building.

The Court of Cassation in *Bardinet and Sons* did not accept this reasoning but held that article 1386 governed the owner's liability for the collapse of a building. Since 1942, the Court has reiterated that interpretation on numerous occasions.<sup>210</sup> It has thus become settled, despite the illogical results it produces. That interpretation is faithful to the intent of the Code's drafters to subject the owner's liability for the collapse of a building to the conditions specified in article 1386. While strained interpretations are available for avoiding that result, the Court must believe that in this instance fidelity to text and to legislative intent requires it to stick with article 1386 as written and traditionally interpreted, rather than adapt it to fit in better with the changed legal landscape.

#### IV. CONCLUSIONS

The story of the reception of article 1384-1° in the French courts demonstrates that French judges do make law. Not only do they make law but they have created a working system of case law. What differentiates the French case-law system from the common law is primarily the formulaic method adopted in France for stating case-law rules. French judges do not struggle to extract holdings from prior cases, but to formulate as precisely as possible the applicable case-law rule. This approach permits greater control by the Court of Cassation over the law applied by the lower courts.<sup>211</sup> If a lower court does not apply the correct formula, annulment will surely follow.

Professor Dawson is correct in criticizing the French courts for not explaining why a particular case-law rule is the applicable rule.<sup>212</sup> That failure may encourage arbitrariness in the selection of the applicable rule. The French approach nevertheless has a largely unnoticed advantage, which favors the formulation of better rules. The French system gives more weight to what judges do over time, while the common-law approach overemphasizes what the judges do when *first* confronted with an issue. At common law, the first case becomes the leading precedent,

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210. A. Weill and F. Terré, *Droit civil; Les obligations* n.718, at 786-88 (3d ed. 1980).

211. A similar desire to control lower court judges may also explain the Supreme Court's resort to the formulaic style in interpreting open-ended provisions of the United States Constitution. Nagel, *The Formulaic Constitution*, 84 U. Mich. L. Rev. (1985).

212. See J. Dawson, *Oracles of the Law* 414-15 (1968), discussed in text at *supra* note 79.

as happened with *Rylands v. Fletcher*,<sup>213</sup> and in subsequent cases the lawyers dispute what the first court held.<sup>214</sup> The French approach does not give as much weight to what the first judges said, but looks to the acceptance of a case-law rule by subsequent judges. Thus, the "lead" case under article 1384-1° is not *Teffaine* but *Jand'heur II*. The French courts have focused on how best to formulate the rule on the guardian's liability and have largely avoided the sterile inquiry, so familiar to common-law lawyers, of what the prior case (here, *Teffaine*) really held.<sup>215</sup>

Another difference between the French system and our own is that all case-law rules in France are interpretations of statutes. The Code occupies the field, and the courts must decide all the cases before them by applying one or more Code provisions. Everything the Court of Cassation does, therefore, is statutory application or interpretation. Gény rejected that position and urged courts to engage in free scientific research—to fashion the best rule in common-law fashion—whenever they encountered a gap in the Code; but Gény's views have not gained general acceptance. Most French jurists believe that courts should limit themselves to the interpretation of statutes.

Since statutes provide the only basis for deciding cases, it is not surprising that statutory interpretation in France is a different and more elaborate enterprise than it is in the common-law world. Interpreters do not view their role as merely a mechanical one, implementing the legislature's original intent, or even as a progressive one, implementing some public purpose which they ascribe to the legislature.<sup>216</sup> Rather, the interpreter's role includes the more creative one of adapting the Code's general principles to changed circumstances. The process is not a free one but an evolutive one, requiring considerable judicial lawmaking.

The nature of the Code itself accentuates the interpretative role of the courts. The Code is not a piece of special interest legislation designed to address a particular problem. Rather, like our Constitution, it is the product of a public-spirited effort to state basic principles to govern

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213. 3 H.L. 330 (1868).

214. See the discussion by the Law Lords in *Reads v. J. Lyons & Co.*, [1947] A.C. 156, where the majority refused to apply the rule of *Rylands v. Fletcher* to an exploding boiler that did not "escape" from the premises.

215. See the unsuccessful argument by Professor Saleilles on what *Teffaine* really held in text at *supra* note 117.

216. The Legal Process School urges judges to interpret statutes to further some public purpose attributed to the statute by the court. That purpose need not have been in the minds of the legislators who enacted the statute. See Eskridge and Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. Pitt. L. Rev. 691, 694-701 (1987) (summarizing views of Hart and Sachs).

people's affairs for an indefinite period.<sup>217</sup> Not surprisingly, French courts treat these basic principles as starting points for reasoning by analogy and for developing over time subordinate rules that best meet present-day needs. American courts have occasionally done the same thing when interpreting open-ended statutes such as the post-Civil War Civil Rights Acts and the Sherman Antitrust Act. In recent years scholars have encouraged courts to interpret such statutes "dynamically" in light of contemporary needs.<sup>218</sup>

This dynamic or evolutive method of interpretation, so new and so unfamiliar to American lawyers, is more commonplace in France. It best describes what the Court of Cassation has accomplished under article 1384-1°. While the Code's drafters did not pay much, if any, attention to that article, they did include special provisions on liability for injuries caused by animals or collapsing buildings. These provisions covered the most common causes of personal injury in 1804 and were plainly intended to favor the injured party. They had become obsolete by the end of the century in that they no longer governed most personal injury cases. Exploding boilers and speeding delivery trucks had become the new villains. Given that change, it is understandable that the Court of Cassation interpreted article 1384-1° to favor persons injured by such things. Certainly the legislature could have reacted to the changed circumstances by amending the Code, but its drafters did not view their product as needing periodic updating. Even if some legislative updating would have been a good thing, its absence forced the courts to play a dynamic role.

This study also instructs us that such a dynamic role is impossible, or at least more difficult, when the courts confront a narrow, special interest provision, such as the 1922 fire statute, or a precisely drafted provision, such as article 1386 on collapsing buildings. In those instances, the courts' role is necessarily more passive; they must implement the legislature's intent, or at least the words which encapsulate that intent. This subordinated judicial role does not mean that detailed or special interest legislation is necessarily a bad thing, as demonstrated by the Workmen's Compensation Law of 1898 and the motor vehicle law of 1985. These laws do what common-law rules cannot do in regulating

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217. On this distinction between special interest statutes (to be interpreted narrowly as the ratification of a deal) and more public-regarding statutes (to be interpreted more purposively), see Easterbrook, *Statutes' Domains*, 50 U. Chi. L. Rev. 533 (1983). For a defense of the Legal Process approach, which assumes all statutes to be public-regarding, see Macey, *Promoting Public-Regarding Legislation through Statutory Interpretation*, 86 Colum. L. Rev. 223 (1986).

218. Eskridge, *Dynamic Statutory Interpretation*, 136 U. Pa. L. Rev. 1479 (1987); Dworkin, *Law as Interpretation*, 60 Tex. L. Rev. 527 (1987).

comprehensively a given subject matter. But this study does show that what does not work well is a mix of detailed statutory rules, such as article 1384-2° (the fire statute) and article 1386, and of general principles subject to judicial evolution, such a article 1384-1°. Those instances will likely produce a poor fit—witness the relationship between article 1384-1° and article 1386 in *Bardinet and Sons*—because two different law-makers are at work.

## APPENDIX I

*Texts of Articles 1382 to 1386  
of Civil Code as promulgated in 1804*

Art. 1382. Any act of a person which causes injury to another obligates him by whose fault it occurred to make reparation.

Art. 1383. Everyone is liable for the injury he has caused not only by his act, but also by his negligence or imprudence.

Art. 1384. [1] A person is liable not only for the injury he causes by his own act, but also for that caused by the act of persons for whom he is responsible or of things that he has under his guard.

[2] The father and, after his death, the mother are liable for the injury caused by their minor children who live with them;

[3] Masters and employers, for the injury caused by their servants and employees in the exercise of the functions for which they have been employed;

[4] Teachers and artisans, for the injury caused by their pupils and apprentices during the time when they were under their supervision.

[5] The aforesaid liability attaches unless the father and mother, teachers and artisans, can prove that they could not have prevented the act that gives rise to this liability.

Art. 1382. Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer.

Art. 1383. Chacun est responsable du dommage qu'il a causé non seulement par son fait, mais encore par sa négligence ou par son imprudence.

Art. 1384. [1] On est responsable non seulement du dommage que l'on cause par son propre fait, mais encore de celui qui est causé par le fait des personnes dont on doit répondre, ou des choses que l'on a sous sa garde.

[2] Le père, et la mère après le décès du mari, sont responsables du dommage causé par leurs enfants mineurs habitant avec eux;

[3] Les maîtres et les commettants, du dommage causé par leurs domestiques et préposés dans les fonctions auxquelles ils les ont employés;

[4] Les instituteurs et les artisans, du dommage causé par leurs élèves et apprentis pendant le temps qu'ils sont sous leur surveillance.

[5] La responsabilité ci-dessus a lieu, à moins que les père et mère, instituteurs et artisans, ne prouvent qu'ils n'ont pu empêcher le fait qui donne lieu à cette responsabilité.



Art. 1385. The owner of an animal, or the person using it during the period of usage, is liable for the injury the animal has caused, whether it was under his guard or whether it had strayed or escaped.

Art. 1386. The owner of a building is liable for the injury caused by its collapse, if this has occurred as a consequence of a failure to keep it in repair or of a defect in its construction.

Art. 1385. Le propriétaire d'un animal, ou celui qui s'en sert, pendant qu'il est à son usage, est responsable du dommage que l'animal a causé, soit que l'animal fût sous sa garde, soit qu'il fût égaré ou échappé.

Art. 1386. Le propriétaire d'un bâtiment est responsable du dommage causé par sa ruine, lorsqu'elle est arrivée par une suite du défaut d'entretien ou par le vice de sa construction.

## APPENDIX 2

*Text of Present Article 1384*  
(other articles remain unchanged)

Art. 1384. [1] A person is liable not only for the injury he causes by his own act, but also for that caused by the act of persons for whom he is responsible or of things that he has under his guard.

[2] However, a person who retains under any title whatsoever all or part of an immovable or of movables which have caught fire shall not be liable, with regard to third persons, for injuries caused by this fire unless it is proved that it is attributable to his fault or to the fault of persons for whom he is responsible.<sup>1</sup>

[3] This provision is not applicable to the relationships between landlord and tenant which remain governed by articles 1733 and 1734 of the Civil Code.<sup>1</sup>

[4] The father and the mother, so long as they exercise parental authority, are jointly and severally liable for the injury caused by their minor children living with them.<sup>2</sup>

[5] Masters and employers, for the injury caused by their servants and employees in the exercise of the functions for which they have been employed.

Art. 1384. [1] On est responsable non seulement du dommage que l'on cause par son propre fait, mais encore de celui qui est causé par le fait des personnes dont on doit répondre, ou des choses que l'on a sous sa garde.

[2] Toutefois, celui qui detient, à un titre quelconque, tout ou partie de l'immeuble ou des biens mobiliers dans lesquels un incendie a pris naissance ne sera responsable, vis-à-vis des tiers, des dommages causés par cet incendie que s'il est prouvé qu'il doit être attribué à sa faute ou à la faute des personnes dont il est responsable.<sup>1</sup>

[3] Cette disposition ne s'applique pas aux rapports entre propriétaires et locataires qui demeurent régis par les articles 1733 et 1734 du Code civil.<sup>1</sup>

[4] Le père et la mère, en tant qu'ils exercent le droit de garde, sont solidairement responsables du dommage causé par leurs enfants mineurs habitant avec eux.<sup>2</sup>

[5] Les maîtres et les commettants, du dommage causé par leurs domestiques et préposés dans les fonctions auxquelles ils les ont employés;

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1. Law of November 7, 1922, inserted new paragraphs 2 and 3 limiting liability for fires.

2. Law of June 4, 1970, amended former paragraph 2 (now paragraph 4) to make the mother jointly liable with the father.

[6] Teachers and artisans, for the injury caused by their pupils and apprentices during the time when they were under their supervision.<sup>3</sup>

[7] The aforesaid liability attaches unless the father and mother and the artisans can prove that they could not have prevented the act that gives rise to this liability.

[8] [Special provision on teachers' liability - not reproduced.]<sup>3</sup>

[6] Les instituteurs et les artisans, du dommage causé par leurs élèves et apprentis pendant le temps qu'ils sont sous leur surveillance.<sup>3</sup>

[7] La responsabilité ci-dessus a lieu, à moins que les père et mère et les artisans ne prouvent qu'ils n'ont pu empêcher le fait qui donne lieu à cette responsabilité.

[8] [Special provision on teachers' responsibility - not reproduced.]<sup>3</sup>

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3. Law of April 5, 1937, deleted the reference to teachers in present paragraph 6 and added new paragraph 8 limiting the liability of teachers. It also repealed a 1899 amendment which had added a new paragraph on teachers' liability.

## APPENDIX 3

*Text of Montagnier v. Leydon*

Court of Cassation - Civil Chamber - October 27, 1885

*The Court*; - See article 1385 of the Civil Code;

[1] Whereas the liability provided by that article rests on a presumption of fault imputable to the owner of the animal which has caused the injury or to the person who was making use of it at the moment of the accident; - and that presumption only yields before the proof of an unforeseeable event [*cas fortuit*] or of a fault committed by the injured party;

[2] Whereas, in the present case, it is established by the findings of the challenged judgment that the injury caused Montagnier arose from the fall of stones which a mule, belonging to Leydon and kept under his guard, had knocked from the top of a wall so as to strike Montagnier;

[3] Whereas, to relieve Leydon from the consequences of that event, the Court of Appeals [the second level trial court] limited itself to declaring that it was not demonstrated that the accident of which Montagnier had been the victim had occurred by the fault, the negligence or the imprudence of Leydon, without identifying any circumstances sufficient to relieve Leydon of that liability; in which the court has violated the provisions of article 1385 cited by the petition;

For these reasons, annul. . . .

## APPENDIX 4

*Text of Jand'heur I*

Court of Cassation - Civil Chamber - February 21, 1927

*The Court;* - On the sole ground; - See article 1384, paragraph 1 of the Civil Code;

[1] Whereas the presumption of fault established by that article against one who has under his guard an inanimate moveable thing which has caused injury to another may be rebutted only by proof of an unforeseeable event [*cas fortuit*] or of an irresistible force [*force majeure*] or of an external cause not imputable to the guardian; and it does not suffice to prove that he committed no fault or that the cause of the injury remains unknown;

[2] Whereas, on April 22, 1925, a delivery truck belonging to the corporation Maison Blumel knocked down and gravely injured the minor Lisa Jand'heur; and the challenged judgment refused to apply the cited text for the reason that at the moment of the accident the truck was operated by Stanlet, a driver in the employ of the owner, and that, therefore, to obtain reparation for the loss, the victim must establish against the driver a fault attributable to him within the terms of article 1382 of the Civil Code;

[3] But whereas the statute, for application of the presumption which it provides, does not distinguish according to whether the thing which caused the injury was operated or not by the hand of man; and that it suffices that it is a thing subject to the necessity of a "guard" by reason of the dangers to which it may expose others; -From which it follows that in ruling as it did, the challenged judgment has reversed the order of proof and violated the text of the cited law;

For these reasons, annul . . . and remand before the Court of Appeals of Lyon.

## APPENDIX 5

*Text of Jand'heur II*

Court of Cassation - All Chambers United - February 13, 1930

*The Court*; - Ruling all chambers united; - On the ground in the petition; - See article 1384, paragraph 1 of the Civil Code:

[1] Whereas the presumption of liability established by that article against one who has under his guard an inanimate thing which has caused injury to another may be rebutted only by proof of an unforeseeable event [*cas fortuit*] or of an irresistible force [*force majeure*] or of an external cause not imputable to the guardian; and it does not suffice to prove that he committed no fault or that the cause of the injury remains unknown;

[2] Whereas, on April 22, 1925, a delivery truck belonging to the corporation *les Galeries belfortaises* knocked down and injured the minor Lise Jand'heur; and the challenged judgment refused to apply the cited text for the reason that an accident caused by a motor vehicle in movement, under the impulsion and direction of man, did not constitute, so long as there was no proof that the injury was due to a defect in the vehicle, the act of a thing under one's guard within the terms of article 1384, paragraph 1, and that, therefore, the victim must, to obtain reparation for the loss, establish some fault imputable to the driver;

[3] But whereas the statute, for the application of the presumption which it provides, does not distinguish according to whether the thing which caused the injury was or was not activated by the hand of man; and it is not necessary that the thing have an inherent defect susceptible of causing the injury, as article 1384 attaches liability to the guard of the thing, not to the thing itself; - From which it follows that in ruling as it did, the challenged judgment reversed the order of proof and violated the text of the cited law;

For these reasons, annul . . . and remand before the Court of Appeals of Dijon.

